MOTION FILED
JAN 20 1983

No. 82-1186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Respondents,

INTERNATIONAL AIR TRANSPORT ASSOCIATION AND FORTY-THREE OF ITS MEMBER AIRLINES (SEE APPENDIX I),
Potential Intervenors.

PETITION FOR LEAVE TO INTERVENE IN *TRANS WORLD AIRLINES, INC.* v. *FRANKLIN MINT CORP.*, NO. 82-1186 AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT OR, IN THE ALTERNATIVE, BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF TRANS WORLD AIRLINES, INC.

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January 20, 1983

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QUESTION PRESENTED

Whether a decision of the U.S. Court of Appeals for the Second Circuit holding on non-constitutional grounds that the cargo liability limitation of Article 22 of the Warsaw Convention, a Treaty of the United States, is prospectively unenforceable in United States courts is a violation of the separation of powers doctrine derived from U.S. Const. art. II, § 2, cl.2 where

(a) no Act of Congress specifically abrogated the United States' adherence to the Convention and neither Congress nor the Executive Branch has expressed any need for a Treaty reservation; and

(b) the decision of the Court of Appeals intrudes upon the ongoing process of Executive and Legislative Branch negotiation and ratification of amendments to the Treaty.*

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* Franklin Mint Corporation, Franklin Mint Limited and McGregor, Swire Air Services Limited, plaintiffs-appellants below (hereinafter referred to collectively as "Franklin Mint"), and Trans World Airlines, Inc. (TWA), defendant-appellee below, were the only parties to these proceedings. Neither International Air Transport Association (IATA) nor its member carriers (except TWA) were parties in the District Court or on the appeal. However, after the Panel of the Second Circuit's September 28, 1982 prospective unenforceability ruling, IATA and 36 of its member airlines filed an *amicus curiae* brief in su[illegible]rt of TWA's petition for rehearing of the Panel's decision. IATA is an organization of 123 international air carriers, many of whom are either owned by ("government ownership" herein means greater than 50% government ownership) or represent foreign sovereign nations which are parties to the Warsaw Convention. Six U.S. airlines are members of IATA. See Appendix (hereinafter "App.") I (66a) for a list of IATA members. Those members who join in this petition are marked by an asterisk in App. I.

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Potential intervenors[1] pray for leave to intervene and further pray that a writ of certiorari be granted to re-

[1] Although not a "party" below within the meaning of 28 U.S.C. § 1254(1), petitioners IATA et al. will have that status if their petition to intervene is granted. Since the issues for review presented herein arose *after* briefing, argument and decision by the Court of Appeals, potential intervenors had no reason for prior participation. Because IATA and its members carry passengers and cargo

view the decision of September 28, 1982 of the United States Court of Appeals for the Second Circuit in *Franklin Mint Corp.* v. *Trans World Airlines, Inc.*

If this Court does not grant leave to intervene, potential intervenors pray that this petition be treated as an *amicus curiae* brief in support of TWA's petition for certiorari. The consent of Franklin Mint and TWA to such filing has been obtained.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 690 F.2d 303 and is set forth as App. A(1a) to this petition. The opinion and order of the District Court from which appeal was taken is reported at 525 F.Supp 1288 and is set forth as App. B(19a). The judgment of the Court of Appeals sought to be reviewed appears as App. C(24a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1982. A petition for rehearing was denied on December 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[2]

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to the United States and are subject to litigation in our courts, they are vitally affected by the decision below, for the reasons explained further in Section C of the Statement of the Case. The purpose of IATA and its member airlines is (1) to promote safe, regular and economical air transportation for the benefit of the peoples of the world, foster air commerce, and study problems connected therewith; (2) to provide a means for collaboration among air transportation enterprises engaged in international air transport and services, and (3) to cooperate with the International Civil Aviation Organization (ICAO), an arm of the United Nations, and other international organizations. Thus, it is submitted that intervention is appropriate. *See e.g., Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); *Banks* v. *Chicago Grain Trimmers Ass'n.*, 390 U.S. 459, *motion for leave to intervene granted*, 389 U.S. 813, *reh'g denied*, 391 U.S. 929 (1968); *Hunter* v. *Ohio ex rel. Miller*, 396 U.S. 879 (1969); *NLRB* v. *Acme Industrial Co.*, 384 U.S. 925 (1966).

[2] *See* note 1, *supra*.

CONSTITUTIONAL PROVISIONS AND TREATY INVOLVED

In this case the U.S. Court of Appeals for the Second Circuit expressly held the limitation of liability provisions of Article 22 of the Warsaw Convention [3] for cargo damage, loss or delay prospectively unenforceable. Petitioners submit that the Court of Appeals' decision violates U.S. Const. art. II, § 2, cl.2, and art. VI, cl.2. For the text of the Warsaw Convention see App. D(26a); the applicable constitutional provisions are set forth in App. E(46a).

STATEMENT OF THE CASE

A. Summary of the Litigation And Decisions Below

In March, 1979 plaintiffs Franklin Mint contracted with TWA for carriage by air from the United States to England under an airway bill listing 714 pounds of numismatic materials.[4] The articles were later stipulated to be worth more than the limitation on liability for loss or damage under Article 22 (2) and (4) of the Warsaw Convention.[5] The materials were either

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[3] All references to "Warsaw Convention" or "Convention" are to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 29, 1934, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11 (A treaty adhered to by the United States October 29, 1934 and by over 100 foreign nations. The adhering nations are listed in App. D (26a)).

[4] This constitutes "international transportation" within the meaning of Article 1 of the Warsaw Convention since the United States and the United Kingdom are parties to the Convention. *See* App. D(27a).

[5] *See* App. D(36-37a). Article 22(2) of the Convention would limit liability to $6,475.98 (250 francs per kilogram) in the absence of a special declaration of value. There was no such declaration in this case. The aforementioned franc is the so called "Poincare franc", which by conversion into U.S. dollars per pound at the last official U.S. price of gold ($42.22 per troy ounce) amounts to a Warsaw limitation of liability of $9.07 per pound (or approxi-

lost or destroyed, thus rendering TWA presumptively liable.[6]

Franklin Mint brought an action in the District Court to recover the full valve of the lost goods, claimed to be $250,000. TWA sought to limit its liability under Article 22(2) of the Convention and moved for summary judgment on "the sole issue [of] TWA's liability, exclusive of interest and costs".[7]

On that issue Franklin Mint urged that the free market price of gold was the applicable conversion standard. TWA suggested three other alternatives: (1) Special Drawing Rights (SDRs), the international unit of account established by the International Monetary Fund in 1968 (and substituted for the Poincare franc in the Montreal Protocols to the Warsaw Convention);[8] (2) the last official price of gold in the United States (the conversion standard selected by the Civil Aeronautics Board (CAB));[9] or (3) the exchange value of the current French franc. The District Court at 525 F.Supp. 1288 (19a) held that the applicable conversion standard for the limitation was the last official price of gold in the United States (21a), in reliance on CAB orders. Thus, the District Court entered judgment for Franklin Mint in the amount of $6,475.98.

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mately $20 per kilogram). *See* CAB Order 74-1-16 (January 3, 1974) 39 Fed. Reg. 1526 (1974) (App. F(48a)) and CAB Order 78-8-10 (August 3, 1978) 43 Fed. Reg. 35971 (1978) (App. G (66a)).

[6] *See* Article 18(1) (35a).

[7] Stipulation and Pre-Motion Order dated June 30, 1981 (Court of Appeals Joint Appendix (A9a). Thus, all parties and the Court contemplated that *some* limitation was applicable.

[8] *See* pp. 8-9 and notes 22 and 27, *infra*, for explanation of the Montreal Protocols.

[9] CAB Order 74-1-16 (January 3, 1974) (48a) establishes the last official price of gold as the unit of conversion under the Warsaw Convention at $42.22 per troy ounce.

Franklin Mint appealed, and a Panel of the United States Court of Appeals for the Second Circuit, in an opinion of September 28, 1982 (1a) written by Judge Winter and joined by Judges Oakes and Cardamone, applied the last official U.S. price of gold as the conversion standard to the specific facts of the case but, without inviting briefing or argument on its prospective holding, held the Article 22(2) liability limitation of the Warsaw Convention, for loss of cargo, prospectively unenforceable "in United States courts". 690 F.2d at 304 (2a).[10]

The Court of Appeals rejected the last official price of gold as a unit of conversion on the ground that by repeal of the Par Value Modification Act in 1978[11] Congress had rejected gold as a monetary standard and that such repeal "was based on a domestic and international conclusion that the official price of gold was wholly out of

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[10] The decision is to "apply only to events creating liability occurring 60 days from the issuance of the mandate in this case." 690 F.2d at 311-12 (18a). The effect of the decision, as counsel for Franklin Mint and other plaintiffs' attorneys have suggested, may extend beyond cargo cases to all Warsaw Convention limits of liability, including those for passenger injury and death. *See Kelly* v. *B.V. Nederlandse Luchtvaart Maatschappij*, No. 82 Civ. 7830 (S.D.N.Y. filed November 24, 1982), a case filed since the decision below, wherein plaintiffs claim applicability of the Warsaw Convention, but also that the passenger limitation of liability is unenforceable. Furthermore, the Second Circuit itself has denied review of a similar question as to passenger cases, which suggests (perhaps inferentially) that the *Franklin Mint* limit of liability unenforceability holding may be dispositive in passenger cases as well. *See In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982), *appeal denied on issue of appropriate unit of conversion*, No. 82-8018 (2d Cir. Aug. 19, 1982).

[11] Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), *amended by* Par Value Modification Act, 31 U.S.C. § 449 (1973), *repealed* 1976 by Pub. L. No. 94-564, 90 Stat. 2660. The repealing Act was enacted in 1976 but became effective April 1, 1978.

touch with economic and monetary reality." 690 F.2d at 309 (13a).[12]

TWA petitioned for rehearing. IATA and the Air Transport Association of America (ATA)[13] were permitted to file an *amicus curiae* brief in support of TWA's petition. The petition for rehearing was denied on December 1, 1982. TWA obtained a stay of issuance of the Second Circuit's mandate, pending its filing of a petition for writ of certiorari.

B. The Warsaw Convention, Its Protocols And Their Implementation By The U.S. Government

After the United Nations Charter, the Warsaw Convention is the most widely adopted of international treaties.[14] It was signed by the parties in 1929 and continuously adhered to by the United States since 1934.[15] Because it is self-executing it needed no supplementary Congressional legislation to bring it into force.[16]

The principal purpose of the framers of the Convention was to establish a uniform body of world-wide rules relating to carriage of passengers and cargo in international aviation transportation.[17] The Treaty establishes a predictable, reliable and consistent basis for resolving

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[12] This is discussed at length in TWA's Petition for Certiorari herein, pp. 5-6 and 15-17.

[13] A non-profit association representing federally licensed U.S. air carriers providing scheduled air transportation both domestically and abroad. It is anticipated that ATA will seek to file an *amicus* brief herein.

[14] A. Lowenfeld, *Aviation Law*, § 4.1, at 7-98 (2d ed. 1981).

[15] *See* note 3, *supra*, and App. D (44a).

[16] *Indem. Ins. Co. of North America* v. *Pan American Airways, Inc.*, 58 F. Supp. 338 (S.D.N.Y. 1944); *Garcia* v. *Pan American Airways, Inc.*, 269 A.D. 287, 55 N.Y.S. 2d 317, *aff'd*, 295 N.Y. 852, 67 N.E. 2d 257, *cert. denied*, 329 U.S. 741 (1946). *See Bacardi Corp.* v. *Domenech*, 311 U.S. 150, 161 (1940).

[17] *See* TWA's Petition for Certiorari herein, pp. 4-5.

disputes as to liability or damage arising from such transportation, thereby providing some measure of stability in the international commercial aviation environment.[18] The actual carrier is made presumptively liable for loss, damages or delay of the cargo (Article 18)[19]—and the *quid pro quo* for that is the limitation of its liability under Article 22 of the Convention.[20] The Convention also provides that all such claims arising under its provisions can only be brought subject to its provisions (Article 24) (37a). It also establishes notice of claim provisions (Article 26), and the jurisdictions where claims may be adjudicated (Article 28) (38-39a).

As another Panel of the Court of Appeals for the Second Circuit recognized just several years ago, the delegates to the Warsaw Convention knew that in years to come civil aviation would change in unforeseen ways. Yet "they wished to design a system of air law that would be both desirable and flexible enough to keep pace with these changes." *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 38 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), *reh'g denied*, 429 U.S. 1124 (1977). Therefore, while

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[18] *See* App. D(27-34a). To this end, the Warsaw Convention defines the international transportation to which it applies (Article 1), the ticket and baggage check requirements for passengers (Articles 3 and 4), the Air Waybill requirements (Articles 5, 6, 7 and 8), the contractual implications of the Cargo Air Waybill (Articles 9, 10 and 11), the rights of the consignor (shipper) and consignee (Articles 12, 13, 14 and 15) and certain customs requirements (Article 16).

[19] And as to passengers and their baggage (Article 17) (35a).

[20] *See Reed* v. *Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499-500 (1967). *See generally Minutes, Second International Conference on Private Aeronautical Law*, Warsaw, October 4-12, 1929 (Horner and Legrez trans. 1975). The presumptions of fault are contained in Articles 17-21 (35-36a) and Article 25 of the Convention (37-38a).

keeping the overall structure of the Convention intact (including the limit of liability provisions), the parties, including the United States, have, by means of the Guatemala City/Montreal Protocols, sought to amend the Convention.[21]

The Protocols substitute the SDR as a unit of conversion for Poincare francs in Article 22(4), provide for substantial upward revision of passenger liability limits, and permit each nation to supplement the Convention limits with a compensation plan.[22] Montreal Protocols 3

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[21] Because of historical opposition in the United States to the Convention limits of liability for death and bodily injury (but not cargo), the U.S. has striven in recent years to persuade the Warsaw parties to revise upwards those limits. The Hague Protocol, Sept. 28, 1955, 478 U.N.T.S. 371, the result of a 1955 conference of the Warsaw parties, doubled the Warsaw limit of liability for bodily injury or death (cargo limitations were not an issue). It was signed but never ratified by the United States. *See generally* A. Lowenfeld, *Aviation Law*, pp. 7-100-127 (2d ed. 1981). On November 15, 1965 the United States gave formal notice of denunciation of the Convention because of the parties' unwillingness to agree to upward revisions of the bodily injury or death limit to amounts desirable to the United States (again, cargo limitations were not the rationale). 50 Dep't State Bull. 923 (1965). In the wake of the adoption of the Montreal Agreement, the U.S. withdrew its notice of denunciation on May 13, 1966. 54 Dep't State Bull. 955-57 (1966). The Montreal Agreement, raising the limitation of liability of the Warsaw Convention to $75,000 for passenger injury or death, was filed with and approved by the CAB on May 13, 1966 as an interim measure pending amendment of the Warsaw Convention. CAB Agreement 18990. Cargo limitations of liability were not changed by the Montreal Agreement. *See also* note 31, *infra*.

[22] The Guatemala City Protocol, reached in February-March, 1971, would establish a single unbreakable limit of liability of approximately $100,000, liability without fault, and an increase of the baggage limitations to 62,500 francs per passenger. *See generally* A. Lowenfeld, *Aviation Law*, pp. 7-154-155 (2d ed. 1981). Again, there was no proposed change to the cargo limitations.

Montreal Protocols 3 and 4 were approved and signed by the Executive Branch and forwarded to the U.S. Senate for advice and consent January 14, 1977. They embody the Guatemala City Protocol

and 4 were signed by the United States in 1975 and are presently awaiting the advice and consent of the U.S. Senate.[23] As noted in the U.S. Senate Foreign Relations Committee Report on the Protocols, "[t]he Montreal Protocols are the result of decades of effort by the United States to improve the existing Warsaw Treaty system."[24] Thus, the United States government has made a clear commitment to adhere to the Convention, while working to amend some of its provisions, including those relating to limits of liability.[25]

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and when in force would change the unit of conversion in Warsaw Convention Article 22(4) from gold (Poincare francs) to Special Drawing Rights (SDRs). They would also raise the limits of liability for death to approximately 100,000 SDRs (approximately $112,000) and provide for individual nations' establishment of a Supplemental Compensation Plan for passenger death. Their limit for loss or damage to cargo would be 17 SDRs (approximately $20) per kilogram, regardless of fault. U.S. ratification would be subject to establishment of an adequate Supplemental Compensation Plan, as reviewed and approved by the CAB. S. Exec. Rep. No. 45, 97th Cong., 1st Sess., at 3-7 (1981). *See* note 31, *infra*.

[23] The Protocols were reported on favorably (16-1) by the U.S. Senate Foreign Relations Committee on November 17, 1981. S. Exec. Rep. No. 45, 97th Cong., 1st Sess., at 3-7 (1981). Although scheduled, they did not reach a floor vote in the last session of the 97th Congress and have been referred back to the Foreign Relations Committee. *See* Aviation Week and Space Technology, November 29, 1982, at 43-44; Aviation Daily, January 3, 1983, at 1.

[24] S. Exec. Rep. No. 45, 97th Cong., 1st Sess., at 5 (1981).

[25] Indeed, it appears that neither the Panel (nor the parties) had at their disposal the Detailed Report of the United States Delegation to the ICAO International Conference on Air Law, Sept. 1975, to revise Montreal Protocols 3 and 4 to the Warsaw Convention. That report demonstrates that it was the United States that urged the use of SDRs as the unit of conversion for the Montreal Protocols. Despite this clear expression of interest by the Executive Branch, the Court of Appeals suggests that because the United States Senate has not ratified these Protocols, their content is not a viable alternative, and that consequently there is no viable conversion rate. The Panel misapprehended the reason why the

Historically, and particularly since 1965, both the Executive and Legislative Branches have relied upon the Civil Aeronautics Board (CAB) to deal with Convention issues involving limitations of liability. Congress has delegated to the CAB authority to coordinate and review international airline matters and agreements [26] and the power and duty to investigate and ensure that the tariffs governing foreign air transportation, including the limitation of liability for cargo carriage, are lawful, fair and reasonable; and to suspend any tariff found to be unlawful; [27] consistent, however, with any treaty obligation of the United States.[28] Since the Warsaw Convention is self-executing, the method of converting the Poincare franc into "lawful money of the United States" [29] pursuant to Article 22(4) of the Convention (37a) has clearly become a tariff function and within the Board's legislative rulemaking functions under the Federal Aviation Act.[30]

Despite changes in the use of gold as a currency base and the ongoing Warsaw Convention amendment process, the latest CAB staff memorandum as to the appropriate unit of conversion affirms the selection of the last official price of U.S. gold by CAB Order 74-1-16 (48a):

> [T]he Board's current course of action [use of the last official U.S. price of gold as a unit of conversion] is superior to any of the alternatives currently available . . . . Pending resolution of this issue by the three agencies [CAB, Department of Transportation, Department of State] we believe the Board

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Guatemala/Montreal Protocols have not been adopted by the United States. The controversy that has delayed legislative approval has to do only with the total supplemental compensation package, not the selection of the SDR as the international unit of conversion.

[26] 49 U.S.C. §§ 1382 and 1386.

[27] 49 U.S.C. §§ 1374(a) and 1482.

[28] 49 U.S.C. § 1502.

[29] 49 U.S.C. § 1373(a).

[30] 49 U.S.C. § 1301 *et seq.*

> should take no action which would disturb the conversion formula now contained in sections 221.175 and 221.176 of the [CAB] regulations [14 C.F.R. §§ 221.175 and 221.176 (1981)].

Memorandum prepared by John Golden, Director, Bureau of Compliance and Consumer Protection, Civil Aeronautics Board, May 20, 1981 (App. H (58a)). Over the years, the Board has also been responsible for implementing other provisions of the Convention and its Protocols [31]—particularly in recent years while coordination of the Montreal Protocols was in process.

C. The Interest of IATA And Its Member Airlines

We recognize that a request to intervene before this Court is unusual. The unanticipated [32] decision of the

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[31] For instance, in 1966 the Executive Branch deferred to the Board for review and approval of the compromise Montreal Agreement, CAB No. 18990, as an interim measure pending negotiation and ratification of a new treaty. Also, CAB Order 74-1-16 (48a) converted Poincare francs into U.S. dollars at the last official U.S. price of gold. And at the Senate hearings regarding the Montreal Protocols, the Senate Foreign Relations Committee received the views of the Board regarding the status of the Supplemental Compensation Plan (prepared pursuant to the Montreal Protocols), which is still pending before the Board. *See Civil Aviation Protocols: Hearing Before the Committee on Foreign Relations United States Senate*, 97th Cong., 1st Sess., at 6-8 (1981). Indeed, the Senate is looking to the Board for a reevaluation of the proposed Supplemental Compensation Plan (*See* CAB Order 77-7-85 (July 20, 1977)) as a condition subsequent to ratification; i.e., it would come into force *only* if the CAB makes a favorable determination. *See* S. Exec. Rep. No. 45, 97th Cong., 1st Sess. (1981). The Plan would be subject to review in United States courts, presumably by petitioners herein. *See* 5 U.S.C. § 702; *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317 (1979).

[32] The result reached by the Court of Appeals had not previously been briefed by the parties, nor did IATA and its member airlines anticipate such a decision. Since the only issue in the case prior to the Panel's decision was the conversion standard for the limitation (stipulated and so ordered by the District Court), and since that

Court of Appeals has the practical effect of denying the member airlines (and at least vicariously some of their owner governments) participation in the normal Warsaw Convention administrative procedures employed by the United States during the amendment process. It also results in additional exposure to unlimited damages and attendant additional costs in the thousands of cargo suits filed each year. Therefore, we submit that intervention is appropriate.[33]

Most of IATA's 123 international members carry air cargo to and from the United States and are consequently subject to litigation in American courts.[34] They carry on their day-to-day business in reliance on the Warsaw Convention framework. The disruption of this structure by judicial abrogation of the limitation will greatly hamper this important international commerce, and significantly increase the cost of doing business in an indus-

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issue had been litigated before other courts with various results, *see* note 51, *infra*, IATA did not seek to burden the judicial process by prior intervention.

[33] *See* note 1, *supra*. IATA has standing to bring this constitutional challenge in its own right and on behalf of its members. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 183-87 (Burton, J., concurring) (1951); *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). IATA and its members meet the test of standing enunciated in *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). *Cf. Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 80-81 (1978):

> Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met. *See, e.g., Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

[34] If the airway bill is issued here or the destination is the United States, they are subject to suit here even if they are an interline carrier. *See* Article 30(2) (39a).

try already staggering under the economic burdens of the times and the effects of deregulation. Indeed, the disarray sown by this case may not be confined to Warsaw cargo cases (for the treaty provisions are interrelated), nor to the aviation industry alone.[35] The member airlines of IATA (and in some cases, their governments) have a right to know whether, by virtue of this decision, the United States, consistent with the actions of the Legislative and Executive Branches, remains a supporter of the Warsaw Convention framework.

IATA's members and their governments fully support the principle of liability limitation embodied in the Warsaw Convention and subsequent treaties. IATA, its member airlines, their respective governments, and shippers in international air transportation rely upon the good faith of the United States in the treaty-making process and United States court decisions in making their business and legal decisions.[36]

The Warsaw Convention greatly facilitates an international commercial process and uniformly establishes vari-

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[35] *See, e.g.*, Brussels Convention, August 25, 1924 (The Hague Rules), 51 Stat. 233 (limit of liability unit of conversion in Poincare francs for loss of international maritime cargo); United Nations Convention on the Carriage of Goods By Sea, 1978 (The Hamburg Rules), A/CONF. 89/13, 30 March 1978 (limit of liability unit of conversion in SDRs for loss of international maritime cargo (to supercede The Brussels Convention)). The SDR is a unit of account in no less than 15 international conventions (some of which are in effect). Merren, *The SDR as a Unit of Account in Private Transactions*, 16 Int'l Law 503, 505 (1982).

[36] *See* note 51, *infra*. It is anticipated that some of their governments may file official communications with the United States Department of State protesting or objecting to the decision, and urging the United States Executive Branch to take appropriate steps to support its commitment to a uniform treaty structure. For these and other reasons suggested, *infra*, this Court should invite the views of the Solicitor General as to the Court of Appeals' decision. *See California* v. *Texas*, 450 U.S. 961 (1981); *Crist* v. *Cline*, 434 U.S. 980 (1977).

ous predictable commercial criteria relevant to the day-to-day conduct of business in international air cargo shipment. The judicial disruption of this structure by abrogation (or reservation) of the limitation of liability provisions will only proliferate uncertainty, increase litigation and complicate business dealings.[37]

Even more important for purposes of the constitutional question herein, IATA is sensitive to the international repercussions of the Court of Appeals' decision among the world's governments and seeks herein to advise this Court of those problems. In the interest of judicial economy, the question presented herein should be promptly and finally resolved [38] before the Court of Appeals' decision engenders a plethora of lawsuits brought under the "no limit of liability" regime. If courts permit the unenforceability holding to be asserted in passenger cases, the upheaval and foreign government reaction could be exponentially greater. *See, e.g., Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 83 (1978).[39]

REASONS FOR GRANTING THE WRIT

A. The Decision Of The Court Of Appeals Violates The Constitutional Separation Of Powers Doctrine By Improperly Interjecting The Judiciary Into The Conduct of Foreign Relations

1. *The Judiciary Has Intervened in the Treaty Negotiation Process*

The Constitution reserves to the Executive Branch the power to negotiate and make treaties, with the advice and consent of the Senate.[40] The primacy of the political

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[37] *See also* pp. 6-7, *supra*.

[38] However, we do not believe this Court needs to decide the proper conversion factor in Article 22 of the Convention to rectify the disarray caused by the Court of Appeals' decision.

[39] *See also* pp. 22-25, *infra*.

[40] U.S. Const. art. II, § 2, cl. 2 (46a).

branches in the conduct of the Nation's foreign relations has always been a cornerstone of the federal judiciary's self-restraint. While the Judicial Branch's power extends to interpretation of treaties,[41] treaties are to be interpreted liberally to carry out the intent of the drafters. *Nielson* v. *Johnson*, 279 U.S. 47, 51 (1929). If circumstances have changed, the court is to examine the conduct of the parties subsequent to ratification of the treaty in order to ascertain its proper construction. *See Pigeon River Improv. Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U.S. 138, 153-63 (1934); *Kolovrat* v. *Oregon*, 366 U.S. 187, 192-194 (1961). The judiciary may not generate a reservation or declare an abrogation of a treaty unless it finds the treaty unconstitutional[42] or holds that it has been superceded by subsequently enacted and conflicting legislation.[43] However, to hold a treaty superceded by subsequent legislation in conflict with it, a court must find that Congress' intent to supercede was clear, definite and specifically in contemplation of the treaty superceded. *See Cook* v. *United States*, 288 U.S. 102, 120 (1933); *United States* v. *Lee Yen Tai*, 185 U.S. 213, 22 S. Ct. 629, 632 (1902); *Union Pacific Railroad* v. *United States*, 99 U.S. 700, 718 (1879); *Valentine* v. *United-States*, 299 U.S. 5, 10-11 (1936); *cf. Whitney* v. *Robertson*, *supra*. Furthermore, it has never seriously been suggested that the judiciary has the power to terminate or generate judicial reservations to treaties.[44] The judi-

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[41] U.S. Const. art. III, § 2, cl. 1 (46a).

[42] The treaty power is unlimited except as it "extends so far as to authorize what the Constitution forbids . . . ." *Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890). *See Reid* v. *Covert*, 354 U.S. 1, 16-17 (1957); *Terlinden* v. *Ames*, 184 U.S. 270 (1902); *Doe ex dem. Clark* v. *Braden*, 16 How. 635, 657 (1853). There was no suggestion by the Court of Appeals in *Franklin Mint* of any constitutional infirmity in the Warsaw Convention.

[43] *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1889).

[44] *Cf. Goldwater* v. *Carter*, 481 F.Supp. 949 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

ciary's "role is limited to giving effect to the intent of the Treaty parties." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 102 S.Ct. 2374, 2380 (1982).

While professing its adherence to these basic principles, the Court of Appeals did precisely what it said it could not do.[45] It created, in effect, a judicial reservation in an existing treaty. More importantly, it also interjected itself into the delicate process of renegotiation of the Warsaw Convention framework, a matter which the Constitution quite clearly leaves in the hands of the political branches.

As we have noted above, the framers of the Warsaw Convention understood that, in years to come, civil aviation would change in unforeseen ways.[46] They accepted the inevitability of future modification of the agreement but committed themselves to make those adjustments within the Convention's basic framework. Indeed, the United States, dissatisfied with the low limits of liability set forth in the Treaty, at one point contemplated denunciation but decided to work within the framework of the Convention for a general modernization of the limits of liability.[47] It took a leadership role in the delicate reconciliation of competing interests within the international community. Those efforts culminated in the Guatemala City/Montreal Protocols. Today, ratification of the Montreal Protocols await the advice and consent of the Senate. In the interim, the political branches of the United States government, along with the governments of the other parties, have committed themselves to operate within the framework of the Convention.

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[45] It claimed to recognize that "it is not the province of courts to declare treaties abrogated. . . ." 690 F.2d at 311, n.26 (17a).

[46] *See* p. 7, *supra*. *Day* v. *Trans World Airlines, Inc.*, 528 F.2d at 38.

[47] *See* pp. 8-9, *supra* and notes 21 and 22, *supra*.

By declaring that the limitation on liability provision of the Convention is unenforceable in "United States courts",[48] the Court of Appeals unilaterally took, in effect, precisely the action which the political branches declined to take when, rather than denounce the Treaty,[49] they determined to work with other nations for its modernization.[50] Taking this unilateral action, the Panel of the Second Circuit, unlike every other federal court[51] and foreign court[52] to consider the matter, ignored the obvious

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[48] 690 F.2d at 304 (6a).

[49] Between signing and ratification of a treaty (as in the case of Montreal Protocols 3 and 4), a party is obliged not to take any action in contravention of the treaty. *United States* v. *D'Auterive*, 51 U.S. 609 (10 How. 607, 623) (1850). The same principle applies under Article 18 of the Vienna Convention on the Law of Treaties, *reprinted in* 81 I.L.M. 679, 686 (1969), which, although not ratified by the United States, has been relied upon by U.S. courts. *See, e.g., Greater Tampa Chamber of Commerce* v. *Goldschmidt*, 627 F.2d 258, 263 n.4 (D.C. Cir. 1980); *Husserl* v. *Swiss Air Transport Co.*, 351 F.Supp. 702, 707 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973).

[50] *See* notes 21, 22 and 23, *supra*.

[51] *See In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982) (selecting last official U.S. price of gold in Warsaw passenger case), *appeal denied on that issue*, No. 82-8018 (2d Cir. Aug. 19, 1982). *Boehringer Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981) (selecting free market price of gold in Warsaw cargo case), *appeal pending*, No. 81-2519; *Deere & Co.* v. *Deutsche Lufthansa A.G.*, N.D. Ill. No. 81 C 4726 (Dec. 30, 1982) (selecting last official U.S. price of gold in Warsaw cargo case).

[52] The following foreign cases demonstrate a willingness by foreign courts to select a Warsaw unit of conversion in the face of shifting currency bases (references in parentheses are to the Court of Appeals Joint Appendix): *Pakistan International Airlines* v. *Compagnie Air Inter S.A.*, No. 79/2278, Court of Appeals of Aix-en-Provence, France (October 30, 1980) (A156-A170); *Hornlinie A.G.* v. *Societe Nationale Petroles Aquitaine*, Supreme Court of the Netherlands, 7 Eur. Trans. L. 933 (1972) (A126-A155); *Companhia de Seguros Maritimos* v. *Varig*, Federal Court of Appeals of Brazil (June 3, 1975); *Association Aeronautique* v. *Thierache*, Tribunal

intent of the United States and its Treaty partners to maintain the Treaty framework despite the transitory difficulties thus far in setting the conversion standard.

2. *The Court of Appeals Has Disregarded the Division of Labor Within the Political Branches*

Another factor makes even more obvious the radical nature of the Court of Appeals' departure from the accepted paths of judicial behavior with respect to the administration of treaty relations. In holding the limitation of liability provision of the Convention unenforceable because of the proposed impossibility of devising a satisfactory conversion formula, the Panel did further violence to the separation of powers principle by failing to acknowledge the unique role which the CAB plays in this aspect of effectuating the Warsaw Convention in the United States. Through the delicate process of renegotiating the Convention, the Executive Branch has relied on the CAB to confirm a viable conversion standard. Far from following the "law of inertia" as suggested by the Court of Appeals,[53] the Board, after vigorous internal debate,[54] acted consistently with the intent of the treaty

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de Grande Instance, Paris, France (February 10, 1973); *Kuwait Airways Corp.* v. *Sanghi*, Bangalore, India (August 11, 1978) (A265-A271); *Balkan Bulgarian Airlines* v. *Tammaro*, Court of Milan, Italy (October 25, 1976) (A262-A264); *Fida Cinematografica* v. *Pan American World Airways*, Rome Civil Court, Italy (October 13, 1976); *Linee Aeree Italiane* v. *Riccioli*, No. 609/79, Rome Civil Court, Italy (November 14, 1978) (A95-A107); *Florencia Cia Argentina de Seguros S.A.* v. *Varig S.A.*, Buenos Aires, Argentina, 1977 Uniform L. Rev. 198 (August 27, 1976) (A255-A261); *Zakapoulos* v. *Olympic Airways Corp.*, No. 256/74, Court of Appeal, 3d Dep't Athens, Greece (February 15, 1974) (A251-A254). The United Kingdom, by Statutory Instrument 1980 No. 281, has selected SDRs as the Warsaw Convention conversion standard (A62-A63). Canada, by regulation, has also established SDRs as the Warsaw conversion standard. Carriage By Air Act Regulations, P.C. 1983—'an. 13, 1983 (effective date Jan. 14, 1983).

[53] 690 F.2d at 310 (14a).

[54] Court of Appeals Joint Appendix A32-A46, A52-A56.

and has applied the official price of gold during the interim period.[55] Thus, the CAB, like the Executive Branch, has chosen to maintain the status quo[56] and the effectiveness of a treaty that is adhered to not only by the United States, but also by over 100 other sovereign nations.

The Court of Appeals has disregarded the presumptive validity of the CAB orders[57] and, consequently, the historical role which this agency has played in the administration of the United States' obligation under the Warsaw Convention.[58] Reviewed in light of the CAB's role, the Court of Appeals' holding that repeal of the Par Value Modification Act of 1973[59] constituted "an explicit abandonment of the previously established unit of conversion"[60] in the Warsaw Convention is especially superficial.[61] Of course, even under the basic principles of treaty

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[55] *See* note 5, *supra*, and CAB Orders 72-6-7 (June 2, 1972) 37 Fed. Reg. 11384 (1972); 74-1-16 (Jan. 3, 1974) (48a); 78-8-10 (Aug. 3, 1978) (52a).

[56] *See* Golden Memorandum, pp. 10-11, *supra* (58a); CAB Order 74-1-16 (48a); and 14 C.F.R. §§ 221.175 and 176 (1981).

[57] Contrary to the Court of Appeals' assumption that the CAB's last statement converting the gold French franc to dollars predates the repeal of the Par Value Modification Act of 1973, the Board on August 3, 1978, stated, with respect to IATA Conditions of Cargo Carriage, "At the present time a carrier's liability for Warsaw traffic . . . is $20 per kilogram. . . ." CAB Order 78-8-10 (August 3, 1978) (52a).

[58] The decision also interferes with the joint effort of the Executive Branch and the CAB to develop a Supplemental Compensation Plan pursuant to the Montreal Protocols. *See* notes 22 and 31, *supra*.

[59] Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), *amended by* Par Value Modification Act, 31 U.S.C. § 449 (1973), *repealed* 1976 by Pub. L. No. 94-564, 90 Stat. 2660.

[60] 690 F.2d at 311 (17a).

[61] In fact, neither the legislative histories of the Par Value Modification Acts nor the statute repealing the latter make any mention of the Warsaw Convention. The legislative history of the repealing

interpretation outlined above, the potential result would be highly questionable since "the intention to abrogate or modify a treaty is not to be lightly imputed to Congress." *Pigeon River Improv. Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U.S. at 160, *quoted in Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 413 (1968). Certainly, a statute which, by the Court of Appeals' own admission was not aimed at abrogating the Warsaw Convention,[62] but rather ameliorating monetary shifts, cannot be said to amount to a congressional denunciation of the Treaty here.

However, it is not necessary to rely simply on the general principles of treaty interpretation. The CAB, the agency relied upon by the Executive and charged by the Legislative Branch[63] with the responsibility for administration of this aspect of U.S. treaty obligations under the Warsaw Convention, has—despite the repeal of the Par Value Modification Act—consistently held to the regulations established by CAB Order 74-1-16 (48a), which applies the last official price of gold as the appropriate conversion standard for cargo (and other Warsaw) limits of liability.[64] Indeed, more than two years after the

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Act reflects the Senate's recognition that there were other purposes for which the official price would still be used to determine the monetary value of gold. It was noted that the "only *domestic* purpose for which it is necessary" was to determine the value of gold held in the form of gold certificates. *See* 690 F.2d at 308, n.11 (10a). The clear inference was that there were other *international* purposes, but this was overlooked by the Court of Appeals. 690 F.2d at 309, n.20, referring to n.12 [*sic*; it should be n.11] (13a). Clearly, the issue in this case is international, not domestic.

[62] "Congress may not have focused explicitly upon the Convention in repealing [the Par Value Modification Act]. . . ." 690 F.2d at 311 (17a).

[63] *See* notes 28 and 30, *supra*.

[64] *See* notes 5 and 9, *supra*. *See also* 14 C.F.R. §§ 221.175 and 176 (1981). Moreover, the Court of Appeals apparently mistakenly believed that application of the official rate of gold to Warsaw

Jamaica Accords and the legislation repealing the Par Value Modification Act of 1973, and more than four months after that legislation became effective on April 1, 1978, the CAB valued the cargo limit according to the last official price of U.S. gold.[65] Accordingly, there was no basis on which the Court of Appeals could constitutionally render unenforceable the liability limits of Article 22 of the Convention. Even were the Court of Appeals' decision devoid of constitutional infirmity, it would merit this Court's review because it conflicts with the "familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties." *Valentine* v. *United States*, 299 U.S. at 10.[66]

Convention limitations was derived solely from the Par Value Modification Act of 1973 and its predecessor. When the Par Value Modification Act adjusted the official rate of gold, the CAB directed the carriers to apply the new rate of conversion in their tariffs. The power to mandate use of the official price was derived from the Federal Aviation Act (*see* CAB Order 72-6-7, June 2, 1972) and *not* from the Par Value Modification Act. In issuing that Order, the CAB took into consideration a number of policy factors, of which the Par Value Modification Act was only one, including the continuing application of the Warsaw Convention. Accordingly, legislation repealing the Par Value Modification Act should not be taken to have precluded the CAB's approval of the last official price of gold for filing in air carrier tariffs governed by the Warsaw Convention.

[65] *See* note 57, *supra*.

[66] Prior to *Franklin Mint*, the Second Circuit had followed this rule. *See Benjamins* v. *British European Airways*, 572 F.2d 913, 918 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Reed* v. *Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), *reh'g denied*, 429 U.S. 1124 (1977).

B. The Decision Of The Court Of Appeals Has And Will Seriously Disrupt International Air Commerce And The Federal Courts

1. *The Decision Has an Immediate Adverse Effect on the International Air Cargo System*

The Court of Appeals' prospective unenforceability holding frustrates the purposes of the Convention not only by casting into limbo air cargo shippers and carriers who will be in litigation over loss or damage to cargo but also by disrupting the routine conduct of the international air cargo business.[67] Quite simply, if the Court of Appeals' mandate takes effect, there will be no limit on liability in suits filed in at least Second Circuit courts, if not all "United States courts",[68] for loss or damage as to Convention-governed air cargo shipments where there has been no special declaration of value under Article 22 (36a). Since a special declaration under Article 22 for *each* item of cargo is simply not practical in most cases for reasons of time, practice and course of dealing, the shippers and air carriers (and their governments) must separately or together consider new arrangements. Obviously, if the Court of Appeals' decision stands, some new arrangements for *some* shippers and *some* carriers must be attempted, but they will probably differ and some may prove impractical. This new process would certainly undermine the uniformity, stability, predictability and reliability envisioned by the framers of the Warsaw Convention.

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[67] As noted at pp. 6-7, *supra*, the Warsaw Convention establishes uniform documentation and commercial obligations requirements, providing an internationally consistent scheme for both cargo shippers and air carriers. In the absence of these provisions both shippers and carriers would have to resort to local rules of commerce as varied as the number of Warsaw contracting parties. The Convention aids in avoiding such a morass and also aids and enables shipping cargo anywhere in the world on a single air waybill.

[68] 690 F.2d at 304 (6a).

The Court of Appeals apparently recognized the devastating effect that this holding might have on the present international aviation system when it provided a moratorium on the effect of the unenforceability ruling and suggested that the airlines reformulate their tariffs filed with the CAB.[69] The Panel's suggestion is unrealistic. International tariffs must be reciprocally consistent. Their reformulation would involve innumerable intricacies and unavoidable delays. In some countries, new enabling legislation and new operating agreements may have to precede amendment of conditions of contract and airway bills by foreign air carriers. Tariff reformulation in this country would also be subject to a time-consuming process, which would necessarily require more than the 60 days allowed by the Panel.[70] Thus, during the interim, the current system would be destabilized, and its uniformity would suffer severely.

2. *The Decision Has An Immediate Adverse Effect on the Federal Courts*

Apparently, the Court of Appeals suggested that tariffs might establish a new limit of liability. Even if new tariffs and new procedures are ultimately upheld, the legal system will be more burdened by a plethora of litigation (including future resort to this Court when, inevitably, the decisions are inconsistent). Such legal challenges would not be limited to those mentioned above, but may include additional issues, relating, *inter alia*, to the continued viability of the presumption of liability under

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[69] 690 F.2d at 312 (18a).

[70] The CAB has recently promulgated a new rule covering tariffs for interstate or overseas air transportation as defined in the Federal Aviation Act, 49 U.S.C. § 1301, *et seq.* The primary reason for the new rule is the elimination of domestic tariffs as of January 1, 1983 pursuant to the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978). *See* 47 Fed. Reg. 14,892 (1982) (to be codified at 14 C.F.R. § 399). Similar implementation orders would probably be necessary for international tariffs if the Panel's decision remains undisturbed, which could cause further delay.

Article 18 of the Warsaw Convention, the required content of new notice provisions, and the effect of possibly inconsistent findings by foreign courts on similar issues.[71] As previously noted, Franklin Mint's attorney has already suggested that *any* tariff attempting to limit liability might be subject to legal challenge.[72] Other cargo shippers' attorneys have already raised issues similar to those presented herein in other courts[73] with differing results, and certainly numerous additional legal challenges may be anticipated.

Although we deal herein with limitations on cargo claims rather than those connected with personal injury or death of passengers, the number of such commercial matters litigated in United States courts is several times the number of passenger cases. To date, because of the uniformity and predictability of the limitation provisions, most of these cargo claims are settled—but the effect of the decision below will make settlement more difficult and increase the number of cases filed and ultimately tried.[74] These practical, severe consequences to the exist-

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[71] For example, courts of other contracting parties to the Convention may reassess their interpretation of the need for uniformity as to limits of liability, further exacerbating the disarray among air carriers, their shippers and insurers. Moreover, under Articles 19 and 60 of the Vienna Convention on the Law of Treaties, *supra*, note 49, the parties to the Warsaw Convention might contend that the Court of Appeals' decision constitutes a material breach of the Convention entitling them to terminate the Convention. *See also* Restatement, 2d Foreign Relations Law of the United States, § 153.

[72] Remarks of John Foster, Esq., Luncheon of the Air Transportation Law Committee and the Water Transportation Law Committee of the Federal Bar Association, December 7, 1982, Washington, D.C. *See also* note 10, *supra*.

[73] *See* note 10, *supra*.

[74] With a presumption of liability and the *quid pro quo* of limitation thereon, the issues and proof of a claim are limited—if the Convention were not in existence, proof of delivery, events, defenses, etc. would complicate the issues and the facts in every case.

ing international air cargo regime demonstrate why, when nations have agreed upon a treaty, it should not lightly be disregarded.

3. *The Decision Has An Adverse Long-Term Effect on International Air Commerce*

If the Court of Appeals' decision is allowed to stand, how will United States initiatives and commitments be regarded at future meetings of Warsaw Convention parties or, indeed, at similar international meetings?

The United States is regarded as an important party to the Warsaw Convention because of the relative size of its aviation industry and its relatively large share of international air traffic. Nevertheless, in a world increasingly conscious of sovereign independence, the United States cannot act unilaterally in a treaty context. Of course, the United States may at times seek to change its treaty relationships or withdraw from treaties or seek to change treaty terms. But such steps should be taken advisedly by the Executive Branch—not by the judiciary. Courts "should hesitate long before limiting or embarassing" the sovereign powers of the United States, particularly as they concern foreign affairs. *Mackenzie* v. *Hare*, 239 U.S. 299, 311 (1915), *quoted in United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 322 (1936).

Foreign relations is certainly one area where the United States should speak with "one voice". If allowed to stand, the Court of Appeals' decision will surely vitiate the longstanding commitment of the Roosevelt Administration that the United States would give full, "good faith" observance to the Warsaw Convention.[75] The contracting parties have manifested an intent to keep the

[75] Proclamation of President Franklin D. Roosevelt declaring U.S. adherence to the Warsaw Convention, 49 Stat. 3000, T.S. 876 (1934).

Warsaw Convention, including the limitation of liability concept, alive despite the ambiguities caused by the changing world monetary situation.[76] The United States, through its Executive Branch, has also sought to further those goals. This Court should not permit the judiciary, on its own motion, to isolate the U.S. legal system or place in further doubt whether this nation "speaks with one voice" with respect to foreign affairs. *See Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976); *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752-53 (1978); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979). As this Court noted in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972), the day is long past when our courts can adhere to the "parochial concept" that "trade and commerce in world markets and international waters [be] exclusively on our own terms, governed by our laws, and resolved in our courts." *See also Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 516 (1974); *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981). The abolition of all standards of liability is simply not a situation desired by any nation, including the United States. Thus, it must be recognized that the decision of the Court of Appeals will have a significant adverse impact on the United States' ability to deal effectively with international legal transactions in other contexts.

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[76] *See* note 52, *supra*.

CONCLUSION

For the reasons stated above, leave should be granted for petitioners to intervene and to file a petition for writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit in *Franklin Mint*. Alternatively, if leave to intervene is denied, petitioners request that this Court treat the petition as an *amicus curiae* brief in support of TWA's petition for certiorari.[76]

Respectfully submitted,

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January 20, 1983

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[76] The page limitation for *amicus* briefs in support of petitions for certiorari is 20 pages, Sup. Ct. R. 36.1, but that rule does not require *amicus* briefs to contain a Statement of the Case. Were the Statement of the Case and those appendices which would normally accompany only a petition for certiorari omitted, this document would meet the 20-page requirement for *amicus* briefs.

JAN 20 1983

No. 82-1186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Respondents,

INTERNATIONAL AIR TRANSPORT ASSOCIATION AND FORTY-THREE OF ITS MEMBER AIRLINES (SEE APPENDIX I),
Potential Intervenors.

APPENDIX TO PETITION FOR LEAVE TO INTERVENE IN *TRANS WORLD AIRLINES, INC.* v. *FRANKLIN MINT CORP.*, NO. 82-1186 AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT OR, IN THE ALTERNATIVE, BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF TRANS WORLD AIRLINES, INC.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 999—August Term, 1981

(Argued April 22, 1982 Decided September 28, 1982)

Docket No. 82-7012

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Plaintiffs-Appellants,

v.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee.

Before:

OAKES, CARDAMONE, and WINTER,
Circuit Judges.

Appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, utilizing the last official price of gold to calculate the limit on defendant's liability under the Warsaw Convention.

The Court holds the limitation provision of the Convention prospectively unenforceable and affirms.

JOHN R. FOSTER, New York, New York (Donald M. Waesche, Waesche, Scheinbaum & O'Regan, P.C., New York, New York, of counsel), *for Plaintiffs-Appellants Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services, Limited.*

JOHN N. ROMANS, New York, New York (Robert S. Lipton, Scott J. McKay Wolas, Curtis, Mallet-Prevost, Colt & Mosley, New York, New York, of counsel) *for Defendant-Appellee Trans World Airlines, Inc.*

(Robert B. Hemley, Norman Williams, Gravel, Shea & Wright, Burlington, Vermont, of counsel) *for Amici-Curiae Jacques Roulin and Hugh Harley.*

WINTER, *Circuit Judge*:

This is an appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, limiting the defendant's liability under the Warsaw Convention ("Convention")[1] for loss of cargo. In determining the limit in United States dollars, Judge Knapp utilized the last official price of gold as a unit of conversion and awarded plaintiffs $6,475.98. 525 F.Supp. 1288 (S.D.N.Y. 1981). Plaintiffs appeal, claiming the limit should have been calculated by other methods. While we agree with the result reached in this case and thus affirm, we hold the Convention's limit on liability prospectively unenforceable in United States Courts.

SUMMARY OF THE ISSUES AND DECISION

The facts in this case, if nothing else, are clear cut. In March, 1979, plaintiffs Franklin Mint Corporation, Frank-

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[1] The Warsaw Convention is formally known as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air," opened for signature October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (adherence of the United States proclaimed October 29, 1934).

lin Mint Limited, and McGregor, Swire Air Services Limited (collectively, "Franklin Mint") contracted with defendant Trans World Airlines, Inc. ("TWA") for the carriage by air from the United States to England of 714 pounds of numismatic materials. Though the articles were worth more than $6,500, Franklin Mint made no special declaration of value. The articles were either lost or destroyed, thus rendering TWA liable under Article 18 of the Convention.[2] Because of the absence of a special declaration, TWA sought to limit its liability under Article 22 of the Convention.

Article 22 limits the carrier's liability for injuries to both "checked baggage and . . . goods" and "objects of which the passenger takes charge himself."[3] The various

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[2] Article 18 of the Convention reads:

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

[3] Article 22 of the Convention reads:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the

limits are stated in terms of a specified number of French gold or "Poincare" francs, a unit of account consisting of "65½ milligrams of gold at a standard fineness of nine hundred thousandths." The limit on baggage or other goods is 250 Poincare francs per kilogram. The dollar value of that limit is calculated simply by converting the gold value of the specified unit into United States dollars, *e.g.*, the limit per kilogram is 250 multiplied by the dollar value of 65½ milligrams of gold.

The difficulty arises from the fact that when Article 22 was drafted, gold served official monetary functions and its price was set by law. The Convention thus selected it as the unit of conversion in order to ensure judgments of uniform value as well as a stable and easily calculable limitation on liability. The plain but highly troublesome fact is that by international agreement and United States domestic legislation gold has now lost its monetary functions and no longer has an official price. Unfortunately for parties to international airline transactions as well as

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said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

for us, the terms of Article 22 continue to utilize gold as the unit of conversion. Thus, the parties raise the issue of what unit of account is now to be used to convert judgments under the Convention into United States dollars.

In arguing the issue, the parties offer four alternatives: (i) the last official price of gold in the United States; (ii) the free market price of gold; (iii) the Special Drawing Right ("SDR"), a unit of account established by the International Monetary Fund ("IMF") and recently proposed as a substitute for gold in the as yet unratified Montreal Protocols to the Convention; and (iv) the exchange value of the current French franc. While acknowledging that "the arguments in favor of . . . the SDR [were] most persuasive," Judge Knapp nevertheless held that the last official price of gold was the appropriate standard. This choice was predicated on the view that this standard "has been . . . espoused by the Civil Aeronautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand," and has been "used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs." 525 F.Supp at 1289.

We share Judge Knapp's doubt about the result. Indeed, there are powerful arguments against each of the proffered solutions. The last official price of gold is a price which has been explicity repealed by the Congress. See note 11, *infra*, and accompanying text. It thus lacks any status in law or relationship to contemporary currency values. The free market price of gold is the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values. SDR's are a creature of the IMF, modified at will by that body and having no basis in the Convention. The French franc is simply one domestic currency, subject to change by the unilateral act of a single government.

Every proffered solution thus appears to have a devastating argument against it. While the Convention has not been formally abrogated, enforcement by national judicial tribunals is impossible without their picking and choosing among alternative units of conversion according to their view of which is best as an initial policy matter. We have no power to select a new unit of account. We thus hold the Convention's limitation of liability unenforceable by United States Courts.

BACKGROUND

Drafted in the late 1920's, the Convention was designed both to protect the fledgling aviation industry from the alternatives of ruinous damage suits or exorbitant insurance premiums and to insure a certain degree of uniformity of legal obligation given the expected international character of the industry. *See* A. Lowenfeld and A. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harvard L. Rev. 497, 499-501 (1967) (hereafter "Lowenfeld and Mendelsohn"); *see also Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977) *and* CAB Staff Memorandum, Warsaw Convention Liability Limits, March 18, 1980, at 5-6. (App. at 43-44). A series of rules governing liability, affirmative defenses and limitations accomplished the former goal, while the Convention's international scope accomplished the latter. Articles 17, 18 and 19 enunciate the carrier's liability for personal injuries, for damage or loss of baggage, and for damage due to delay. Articles 20 and 21 establish as affirmative defenses lack of fault and contributory negligence. Finally, Article 22 provides a limitation on the extent of liability for both personal injury and loss of luggage or other goods.

The personal injury limitations amounts have been subject to upward revision from time to time through protocols to the original agreement. These revisions have come in the wake of a continuing debate, with the de-

veloped countries, notably the United States, Great Britain and France, arguing for higher limits, and the less developed nations seeking reduction of the existing limit.[4] Lowenfeld and Mendelsohn at 504. Throughout this period, the level of the limitations on liability for loss or destruction of checked baggage and other goods has remained the same.

Defining recoveries in terms of a specified amount of gold was intended to produce stability and uniformity. Such a common standard allowed the conversion of liability limits into national currencies and insulated recoveries from the vicissitudes of currency fluctuation and devaluation. In drafting the Convention, a proposal to fix recoveries purely in terms of the French franc was rejected by Switzerland on the ground that use of a single national currency rendered the liability limit subject to change by the act of one government. *See* Second Interna-

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[4] In 1955, at The Hague, the conferees would agree only to a doubling of the limit to 250,000 Poincare francs or $16,600. Lowenfeld and Mendelsohn at 504-09. The United States unenthusiastically signed the Hague Protocol a year later, but did not present the treaty to the Senate until July 1959. Lowenfeld and Mendelsohn at 515. The Senate never ratified the Protocol because of its low limit, however, and ultimately the Kennedy/Johnson Administrations actually threatened United States denunciation of the Convention. This threat came in the wake of Congress' failure to enact a legislative package ratifying the Hague Protocol while compelling the purchase by all American air carriers of $50,000 in insurance for each passenger. To avoid United States denunciation, a conference met in Montreal in the spring of 1966. The result of this meeting was the so-called Montreal Agreement "which provided for absolute carrier liability up to $75,000 on all flights into or out of the United States." *Reed v. Wiser*, 555 F.2d at 1087. Appeased, the United States withdrew its denunciation. However, it continued to press for an amendment to the Convention raising personal injury liability limits. In 1971, the parties promulgated the Guatemala City Protocol under which personal injury limits were to be raised to $100,000 at the then current exchange rate of $35 per ounce of gold." *Id.* at 1089 n.12. However, the United States has not ratified that protocol.

tional Conference on Private Aeronautical Law, Minutes, October 4-12, 1929, Warsaw, at 88-89 (Horner and Legrez trans. 1975), (App. at 247-248). As the Swiss delegate put it, "Naturally one can say 'French franc' but . . . its [France's] national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision." *Id.* at 89-90, (App. at 248-249). Accordingly, the Swiss pressed for a standard which tied the limitation to a gold value regardless of the national currency actually named in the article. *Id.* at 90, (App. at 249). The conferees accepted the Swiss position and stated the limitation in terms of the Poincare franc defined as "65½ milligrams of gold at a standard fineness of nine hundred thousandths." Convention, art. 22 § (4).[5]

From October, 1934, when the United States first adhered to the Convention, until 1978, use of gold as unit of account posed no problem for United States Courts or the judicial tribunals of other signatory nations. In 1934, the value of gold was set at $35 per troy ounce pursuant to statute, United States Gold Reserve Act of 1934, Pub. L. No. 73-87, 48 Stat. 337 (1934). When the United States became a party to the International Monetary Fund (IMF) in 1945, *see* Bretton Woods Agreements Act, ch. 339, § 2, Pub. L. No. 79-171, 59 Stat. 512 (1945) (codified at 22 U.S.C. § 286 (1976)), it promised to maintain (and, if necessary, redeem) the value of United States dollars

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[5] There was only one change made in this standard at the Hague in 1955. To avoid any confusion, the conferees deleted reference to the Poincare franc and defined the specified sums as referring "to a *currency unit* consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred." Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. Mar. L. & Com. 645, 647-48 n.7 (1974). Since the United States never ratified the Hague Protocol, the old language still governs American courts. That change, however, is entirely formal, since the elimination of any reference to the French franc merely clarified the Convention's desire to use gold, a point never doubted in the United States.

in terms of gold. For purposes of the Convention's limits on liability, therefore, the relationship of gold and the dollar allowed judicial tribunals to award judgments on a stable, uniform basis.

At the time of Bretton Woods, the United States dollar was grossly undervalued and was actually an asset more valuable than gold. The promise to redeem all dollars in gold could thus be made without having to be fulfilled.[6] From 1955, however, the United States faced a persistent balance of payments deficit. Where once there existed a dollar shortage, there now developed a dollar glut.[7] To compensate, central banks abroad began trading their dollars for gold, and hoarders and speculators began accumulating the metal in increasing amounts. From 1955 to 1968, United States gold reserves plummeted from approximately $24 billion to around $10 billion.[8]

These events led ultimately to the demise of the gold standard. In early 1968, depletion of the United States gold reserve led the central banks of Belgium, the Federal Republic of Germany, Italy, the Netherlands, Switzerland, the United Kingdom and the United States to agree to discontinue supplying gold to private markets. A so-called "two-tier" system of gold pricing—a market price set accordingly and the official price set under Bretton Woods[9]—was thus created. This eased the pressure but could not remedy the essential flaw. In addition to persistent United States balance of payment deficits, international gold reserves grew more slowly than the volume of world economic activity. As a consequence, banks faced

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[6] *See* P. Samuelson, *Economics*, 686-88 (8th ed. 1970).

[7] *Id.* at 690-91.

[8] *Id.* at 691, Figure 36-1.

[9] *See* Asser, *supra* note 6, at 650; Gold, *International Monetary Law: Change, Uncertainty and Ambiguity*, 15 J. Int'l L. & Econ. 323, 340-41; Samuelson, *supra* note 7, at 698-99.

pressures to liquidate official holdings in light of readily available market profits. The stage was thus set for abandonment of the Bretton Woods arrangements.

In August, 1971, the United States suspended its commitment to convert dollars for gold.[10] In May, 1972, it devalued the dollar by raising the official price of gold to $38 per ounce. *See* Par Value Modification Act, Pub. L. No. 92-268, § 2, 86 Stat. 116 (1972) (formerly codified at 31 U.S.C. § 449 (1972)). In October, 1973, yet another devaluation raised the price to $42.22 per ounce. *See* Par Value Modification Act, amendments, Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973) (formerly codified at 31 U.S.C. § 449 (1976)).

The dollar's troubles led the IMF to put forth a plan to abolish the official price of gold, to delete references to gold in its articles, and to substitute SDR's as the Fund's reserve asset and unit of account. The plan was proposed in the 1976 Jamaica Accords, was passed by the Fund's members and became effective April 1, 1978. In the interim, the United States passed implementing legislation including a repeal of the Par Value Modification Act of 1973 and the abolition of the official price of gold.[11] Along with the Jamaica Accords, the measure also became effective on April 1, 1978.

This radical change in the international monetary system created an obvious problem under the Warsaw Convention. With gold abandoned as a currency base and the official price repealed, gold became a commodity with a

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[10] *Id.* at 641; Asser, *supra* note 6, at 651.

[11] In repealing the official price generally, Congress retained its use for the limited purpose of determining the value of gold held in the form of certificates. See 31 U.S.C. § 4056. The Senate noted that this was the "only domestic purpose for which it is necessary to define a fixed relationship between the dollar and gold . . . ." S. Rep. No. 94-1295, 94th Cong., 2d Sess. 18, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5935, 5966-67.

daily fluctuating free market price. That the difficulty in continuing to use gold as a monetary base undermined the Convention's unit of conversion was immediately recognized. Thus, the Warsaw conferees met in Montreal in 1975, even before the Jamaica Accords, and drafted and signed a Protocol substituting SDR's as the Convention's unit of conversion. At the time of the proposal, the SDR was calculated in terms of gold.[12] With the Jamaica Accords, the referent was changed to a basket of 16 national currencies, and in January, 1981, the basket was reduced to five currencies.[13] The Montreal Protocol was presented to the United States Senate in January, 1977 but has not been ratified.

Meanwhile, parties to the Convention have utilized a variety of units of conversion. The record shows Sweden and Britain have adopted SDR's for purposes of Warsaw.[14] Both a Netherlands court and the Civil Court of Rome reached the same result.[15] Two French courts have recently decided that the Warsaw unit is to be converted simply into the current French franc.[16] The United States

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[12] Gold, *supra* note 10, at 345.

[13] Ward, *The SDR in Transport Liability Conventions: Some Clarifications*, 13 J. Mar. L. & Com. 1, 3 (1981).

[14] *See* Sweden's Carriage by Air Act (1957), amendment to Chapter 9, § 22, effective April 27, 1978, (translated and reprinted in App. at 57-61); *see also* the British Carriage by Air (Sterling Equivalents) Order of 1980, Statutory Instrument 1980 No. 281, effective March 21, 1980, (reprinted in App. at 62-63).

[15] *State of the Netherlands v. Giant Shipping Corp.*, Rechtspraak van de Week, 30, May, 1981, 321 (Supreme Court of the Netherlands, May 1, 1981) (translated and reprinted in App. at 64-93); *Linee Aeree Italiane v. Ricciole* (Rome Civil Court Judgment 609/1979, Nov. 14, 1978), (translated and reprinted in App. at 95-108).

[16] *See Chamie v. Egyptiar* (Cours d'appel Paris, Jan. 31, 1980) (translated and reprinted in App. at 171-91); *Pakistan Int'l Airlines v. Compagnie Air Inter. S.A.*, (Cours d'appel Aix-en-Provence Oct. 31, 1981) (translated and reprinted in App. at 156-70).

District Court in the Southern District of Texas recently opted for the free market price of gold,[17] the standard utilized by an Indian court,[18] and a Greek court.[19] Finally, the last official price of gold, chosen by the District Court in this case, was relied upon by Judge Sifton in *In re Air Crash Disaster at Warsaw Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982) and is still utilized by the CAB pursuant to a 1974 order.

DISCUSSION

The controlling facts in this case are: (i) enforcement of the Convention's limitation on liability requires a unit of conversion to translate judgments into domestic currency; (ii) there is no longer an internationally agreed upon unit of conversion; and (iii) there is no United States legislation specifying a unit to be used by United States Courts.

The need for a unit of conversion is self-evident. Without it, a rational limit on liability cannot exist, much less one which produces judgments of equal value in different currencies.

The lack of an internationally agreed upon unit is also obvious. The very convening of the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated by events. In plain fact, different countries now apply different units. Although the alternatives argued before us yield limitations

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[17] *Boehringer Mannheim Diagnotecs, Inc. f/k/a Hycel, Inc. v. Pan American World Airways, Inc.*, 531 F.Supp. 344 (S.D. Tex. 1981).

[18] *Kuwait Airways Corp. v. Sanghi*, Regular Appeal No. 54 of 1977 (Civil Station, Bangalore, India, August 11, 1978) (reprinted in App. at 265-71.)

[19] *Zakoapolos v. Olympic Airways Corp.*, No. 256 of 1974 Ct. of App.; 3d Dep't., Athens, Greece (February 15, 1974) (translated and reprinted in App. at 251-54.)

on TWA's liability in this case ranging from less than $6,500 to over $400,000, each has been adopted as the proper unit of account by at least one party, or domestic tribunal of a party, to the Convention. This disarray merely confirms the obvious fact that the Jamaica Accords destroyed the international arrangements which had led to adoption of gold as a unit of conversion.

International disarray is also reflected in the lack of legislation in the United States implementing the Convention by establishing a unit of conversion. While the "last" official price of gold is offered as a possible unit, "last" is really an euphemism for "no longer" or "repealed." The repeal of the Par Value Modification Act in 1978 was in every sense a legislative declaration that the price of $42.22 per troy ounce was no longer recognized by the United States.[20] We fail to see the logic in adopting as a legal standard a specified value for gold which has been specifically rejected by the United States Congress. Congress' action, moreover, as well as that taken by the other parties to the Jamaica Accords, is highly relevant to the Convention. The repeal of the Par Value Modification Act was based on a domestic and international conclusion that the official price of gold was wholly out of touch with economic and monetary reality. Since use of a fixed amount of gold as the Convention's unit was specifically designed to establish a limitation level at a certain value, this repeal must be taken as a statement that the official price no longer reflects that specified value. The case for continuing to use the now repealed price of gold thus finds no support in law or logic.

The CAB order on which Judge Knapp relied was expressly premised on the existence of an official price under the Par Value Modification Act of 1973. The more recent

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[20] The sole remaining use of the last official price is in determining the value of gold held in the form of gold certificates. *See* note 12, *supra*. That is not relevant to the issues here.

internal CAB memorandum supporting continuation of that order is based ultimately on a policy determination that the last official price is the best available standard.[21] The inconsistency of the CAB position, however, is starkly evident. It rejects SDR's because the Senate has not ratified the Montreal Protocol, while adopting the last official price of gold which has been explicity rejected by the Congress. The sole criterion supporting the CAB's position appears to the the law of inertia.

The other alternatives have an equally infirm base. Neither the free market price of gold nor the current French franc was ever agreed to by the treaty's framers, both are gross departures from its purposes, and, as to the latter, there is ample evidence that it was specifically rejected. The framers clearly contemplated use of the governmentally fixed price of gold in adopting it as a unit of account in the hope of providing stability. The free market price of gold, however, is simply the daily fluctuating price of a commodity, affected by conditions relating to supply and nonmonetary uses affecting demand.[22] The current French franc is similarly flawed. To enforce it would amount to a deliberate departure from the expressed wishes of the framers to avoid the use of a single national currency subject to unilateral action.

TWA argues that we should adopt the International Monetary Fund's SDR as the unit of conversion. It is true that the SDR was "created by the IMF in 1969 to replace gold and the foreign exchange as an international reserve asset." [23] "[M]ember central banks may exchange SDR's

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[21] CAB Internal Memorandum, Warsaw Convention Liability Limits, May 20, 1981 (App. at 32-38).

[22] Appellant's reliance on dicta in our decision *Reed v. Wiser*, 555 F.2d at 1089 n.12, is misplaced. The *Reed* footnote implied a free market standard under the Guatemala City Protocol which the U.S. has not ratified.

[23] Ward, *supra* note 14, at 2.

for other convertible currencies and, therefore, SDR balances are actually lines of credit against which reserves may be borrowed for use in central bank operations." [24] As noted above, methods of calculating SDR's have been changed from time to time. They are presently calculated with reference to a so-called basket of five currencies—the U.S. dollar, the Deutsche mark, the French franc, the Japanese yen, and the pound sterling. The amount of each currency in one SDR is a function of the percentage weights which are assigned to each currency in the basket. The dollar value of one SDR is then determined by adding the "dollar values of each currency component based on daily market exchange rates." [25]

Though the value of any one currency in terms of SDR's fluctuates from day to day, SDR fluctuations are generally less extreme than fluctuations in the free market price of gold. The relative stability of the SDR has thus led the Warsaw signatories to propose its substitution as the Convention's unit of account. The proposal was formally drafted in 1975 as part of the Montreal Protocols to the Convention and has been presented to the signatory states for ratification. Though the substitution was supported by the United States, there has been opposition by non-IMF signatories and very few signatories (the United States included) have actually ratified the Protocol.

The inappropriateness of our adopting SDR's as the unit of conversion is plain. The Convention itself contains not the slightest authority for its use and the Senate has thus far declined to ratify the Montreal Protocols. Moreover, the decision in principle to use SDR's is only the first step. After that, a further step must be taken to define the limitation of liability in terms of a particular number of SDR's per kilogram of baggage. In effect, we

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[24] *Id.*

[25] *Id.* at 2.

would have to set the level of the limitation. Finally, the SDR is a creature of an international body, the IMF, and is subject to modification or outright elimination by that body. In fact, the method of calculating SDR's has been changed three times in the last seven years. This Court has no power under the terms of the Convention or relevant domestic source of authority to adopt a unit of conversion variable at the whim of an international body distinct from the parties to the Convention.

It is thus clear that neither international nor domestic sources of law specify a unit of account for purposes of the Convention. We deal here not with ambiguities which may be clarified by reference to underlying purpose or with language which inadequately mirrors the understood intentions of the drafters. For almost two generations, the Convention's limits on liability have been translatable into domestic currency values by application of a clear and easily applied formula. An essential ingredient of that formula has, as a consequence of international action followed by domestic legislation, ceased to exist. What the parties ask us to do is to select, upon the basis of our judgment as to what is best as a matter of policy, a new unit of conversion. We are without authority to do so.

Treaty negotiation and proposal is the province of the executive and ratification is the exclusive province of the United States Senate. U.S. Const. art. II, § 2, cl. 1; *Doe ex dem. Clark et al. v. Braden*, 16 How. 635, 656-57 (1853). While federal courts are necessarily called upon to interpret treaties, *The Federalist* No. 3 (J. Jay) (Rossiter ed. 1961); *see also id.* No. 80 (A. Hamilton), they must observe the line between treaty interpretation on the one hand and negotiation, proposal and ratification on the other. *See Baker v. Carr*, 369 U.S. 186, 211-12 (1961). To be sure, great difficulty may arise in ascertaining where that line is drawn and when it has been crossed.[26] *See*,

[26] Given the lack of an internationally agreed upon standard of conversion, it might be argued that the Convention has been abro-

e.g., Goldwater v. Carter, 444 U.S. 996 (1979). However, selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties, as the history of the Convention demonstrates.

While international disarray as to the proper unit of conversion under the Convention alone might not disable us from enforcing a new unit, such a unit must be selected either through treaty ratification by the Senate or by legislation passing both Houses of the Congress. The repeal of the Par Value Modification Act was an explicit abandonment of the previously established unit of conversion. While Congress may not have focused explicitly upon the Convention in repealing that Act, its purpose, abandonment of a price which was out of touch with economic reality, plainly encompasses use of that price to convert judgments to United States currency values. Congress thus abandoned the unit of conversion specified by the Convention and did not substitute a new one. Substitution of a new term is a political question, unfit for judicial resolution. We hold, therefore, that the Convention's limits on liability for loss of cargo are unenforceable in United States Courts.[27]

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gated. However, treaties involve international obligations entered into by coordinate branches of the government and it is not the province of courts to declare treaties abrogated or to afford relief to those (including the parties) who wish to escape their terms. These are not matters for "judicial cognizance." *Whitney v. Robinson*, 124 U.S. 190, 194 (1887); *see also Terlinden v. Ames*, 184 U.S. 270 (1901). They belong to the executive and legislative departments because they are more properly the domain of "diplomacy and legislation, . . . not . . . the administration of laws." *Whitney v. Robertson*, 124 U.S. at 195.

[27] The Convention establishes liability as well as limits it. Note 2, *supra*. Our holding is limited solely to the unenforceability of the limits and we express no view as to the severability of those limits from the rest of the Convention.

CONCLUSION

This ruling is prospective and will apply only to events creating liability occurring 60 days from the issuance of the mandate in this case. Prospective effect is compelled by the fact that this is the first case in which a court has declined to enforce the Convention's limits on liability. The parties assumed our power to select a new unit and thus our "resolution was not clearly foreshadowed." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). Parties to transactions covered by the Convention should have time to adjust their affairs to this ruling. *Cf. Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 50 U.S.L.W. 4892 (U.S. June 28, 1982) (judgment holding Bankruptcy Act unconstitutional stayed until October 4, 1982). As to events occurring before that date, we hold that the last official price of gold shall be used to calculate the limits on liability. Because of both the CAB ruling discussed above and the lack of alternatives, air carriers, at least in this country, have relied on the last official price of gold. All carriers have thus filed tariffs that comply with that standard and substantial "injustice and hardship" would result were they not allowed time to reformulate those tariffs. Other parties may continue to protect themselves through insurance.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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81 Civ. 1700 (WK)

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES, LIMITED,
Plaintiffs,

—against—

TRANS WORLD AIRLINES, INC.,
Defendant.

MEMORANDUM AND ORDER

WHITMAN KNAPP, D.J.

On March 23, 1979, plaintiff Franklin Mint Corporation ("Franklin") delivered to defendant Trans World Airlines, Inc. ("TWA") for carriage from Philadelphia, Pennsylvania to London's Heathrow Airport, four packages weighing some 714 pounds. Although the packages are said to have contained a large quantity of valuable coins, Franklin made no special declaration of value at the time of delivery. TWA charged Franklin $544.96 for the shipment. The four packages never arrived at their destination, and Franklin brought this action to recover their full value, which it fixes at $250,000. The parties agree that this action is governed by the terms of the Warsaw Convention, and that TWA is liable for the loss. Before us is a motion by TWA for partial summary judgment as to the extent of its liability. We grant that motion in part and deny it in part.

Article 22 of the Warsaw Convention provides that, unless a special declaration of value is made at the time of delivery, a shipper's liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram. Article 22 states, moreover, that this limitation of 250 francs:

> "shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths [the so-called Poincare franc]. These sums may *be converted into any national currency* in round figures." (Emphasis added.)

Counsel for TWA, in an extraordinary lucid and comprehensive brief, has suggested three possible bases for the calculation converting the Article 22 limitation into United States dollars: (1) the Special Drawing Right ("SDR"), used by members of the International Monetary Fund ("IMF") as a unit of account; (2) the last official price of gold in the United States; and (3) the exchange value of the current French franc. Counsel for Franklin, in an equally able brief, suggests a fourth possibility: the free market price of gold.

Were we writing on a clean slate, we would find the arguments in favor of the first of TWA's suggestions (the SDR) most persuasive. However, TWA's second suggestion (the last official price of gold in the United States) has—arguably, at least—been espoused by the Civil Aeronautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand. It therefore comes as close as anything to constituting a governmental interpretation of the Article 22 limitation. Also, it is used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs. It would seem to follow that the parties intended to adopt the last official price of gold as the basis for converting the Article 22 limitation into dollars in the instant case.

Beyond saying the foregoing we can, since there are no disputed issues of fact upon which a finding by us is required, see no purpose to be served by delaying a decision while we seek to put in our own words the arguments so cogently expressed by counsel for TWA. Accordingly, we simply adopt those arguments to the extent that they support our conclusion that the conversion should be premised on the last official price of gold in the United States.

Let counsel for TWA submit a proposed order on ten days notice. As we understand the stipulation of the parties, such an order would in effect direct that judgment be entered for plaintiff in the amount of $6,475.98 plus interest and costs, a result which would permit immediate appeal from this order.

SO ORDERED.

Dated:

New York, New York
November 6, 1981

/s/ Whitman Knapp
WHITMAN KNAPP
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 1700 (WK)

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES, LIMITED,
Plaintiffs,

—against—

TRANS WORLD AIRLINES, INC.,
Defendant.

[Filed Dec. 4, 1981]

ORDER AND JUDGMENT

For the reasons stated in the Memorandum and Order of this Court, dated November 6, 1981, it is

ORDERED, ADJUDGED AND DECREED: that the maximum liability herein of defendant Trans World Airlines, Inc. shall be determined under Article 22 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000 *et seq.* (1934), T.S. 876, *reprinted in* 49 U.S.C. § 1502 note (1970), by a conversion factor premised on the last official price of gold in the United States, and it is

FURTHER ORDERED, that in accordance with the foregoing conversion factor, final judgment shall be entered for plaintiffs in the amount of $6,475.98, plus interest and costs.

Dated:

New York, New York
December 3, 1981

s/ Whitman Knapp
WHITMAN KNAPP
U.S.D.J.

Judgment Entered 12/4/81
/s/ _____
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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81 Civ. 1700 (WK)

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES, LIMITED,
Plaintiffs,

—against—

TRANS WORLD AIRLINES, INC.,
Defendant.

ORDER

WHITMAN KNAPP, D.J.

The first sentence of the second paragraph of our November 6, 1981 Memorandum and Order is hereby amended to read:

> "Article 22 of the Warsaw convention provides that, unless a special declaration of value is made at the time of a delivery, a carrier's liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram."

SO ORDERED.

Dated: New York, New York
December 18, 1981

WHITMAN KNAPP, U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of September one thousand nine hundred and eighty-two.

Present:

HON. JAMES L. OAKES
HON. RICHARD J. CARDAMONE
HON. RALPH K. WINTER

Circuit Judges,

#82-7012

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES LIMITED,
Plaintiffs-Appellants,

v.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

by /s/ Arthur Heller
ARTHUR HELLER
Deputy Clerk

APPENDIX D

WARSAW CONVENTION

49 Stat. 3000, T. S. 876

CONVENTION FOR UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR

The President of the German Reich, the Federal President of the Republic of Austria, His Majesty the King of the Belgians, the President of the United States of Brazil, His Majesty the King of the Bulgarians, the President of the Nationalist Government of China, His Majesty the King of Denmark and Iceland, His Majesty the King of Egypt, His Majesty the King of Spain, the Chief of State of the Republic of Estonia, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, the President of the Hellenic Republic, His Most Serene Highness the Regent of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia, Her Royal Highness the Grand Duchess of Luxemburg, the President of the United Mexican States, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Poland, His Majesty the King of Rumania, His Majesty the King of Sweden, the Swiss Federal Council, the President of the Czechoslovak Republic, the Central Executive Committee of the Union of Soviet Socialist Republics, the President of the United States of Venezuela, His Majesty the King of Yugoslavia:

Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier.

Have nominated to this end their respective Plenipotentiaries, who, being thereto duly authorized, have concluded and signed the following convention:

CHAPTER I. SCOPE—DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Article 2

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I. PASSENGER TICKET

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to

avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II. BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22(2);

(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage, check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those pro-

visions of the convention which exclude or limit his liability.

SECTION III. AIR WAYBILL

Article 5

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill": every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

Article 6

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of goods has the right to require the consignor to make out separate waybills when there is more than one package.

Article 8

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(*j*) The apparent condition of the goods and of the packing;

(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(*m*) The amount of the value declared in accordance with article 22(2);

(*n*) The number of parts of the air waybill;

(*o*) The documents handed to the carrier to accompany the air waybill;

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Article 10

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

Article 11

(1) The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.

(2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

Article 12

(1) Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring them to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor shall cease at the moment when that of the consignee begins in accordance with article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

Article 13

(1) Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of the charges due and on

complying with the conditions of transportation set out in the air waybill.

(2) Unless it is otherwise agreed, it shall be the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the carrier the rights which flow from the contract of transportation.

Article 14

The consignor and the consignee can respectively enforce all the rights given them by articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

Article 15

(1) Articles 12, 13, and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of articles 12, 13, and 14 can only be varied by express provision in the air waybill.

Article 16

(1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi, or police before the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any damage occasioned by the absence, insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III. LIABILITY OF CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3 The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liabiilty of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower sum than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract which shall remain subject to the provisions of this convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in the convention.

(2) In the cases covered by article 17, the provision of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused

under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 26

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

Chapter IV. Provisions Relating to Combined Transportation

Article 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

(2) Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air.

Chapter V. General and Final Provisions

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.

Article 33

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

Article 34

This convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 35

The expression "days" when used in this convention means current days, not working days.

Article 36

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

Article 37

(1) This convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which shall give notice of the deposit to the Government of each of the High Contracting Parties.

(2) As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after the deposit.

(3) It shall be the duty of the Government of the Republic of Poland to notify the Government of each of the

High Contracting Parties of the date on which this convention comes into force as well as the date of the deposit of each ratification.

Article 38

(1) This convention shall, after it has come into force, remain open for adherence by any state.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Article 40

(1) Any High Contracting Party, may at the time of signature or of deposit of ratification or of adherence, declare that the acceptance which it gives to this convention does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any other territory under its suzerainty.

(2) Accordingly any High Contracting Party may subsequently adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or

any other territory subject to its sovereignty or to its authority or any other territory under its suzerainty which have been thus excluded by its original declaration.

(3) Any High Contracting Party may denounce this convention, in accordance with its provisions, separately or for all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority, or any other territory under its suzerainty.

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

• • • •

NATIONS ADHERING TO WARSAW CONVENTION

as listed in *Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on January 1, 1982,* at 207 (U.S. Dept. of State)

Afghanistan
Algeria
Antigua & Barbuda
Argentina
Australia
Austria
Bahamas, The
Bangladesh
Barbados
Belgium
Benin
Botswana
Brazil
Bulgaria
Burma
Cameroon
Canada
Chile
China
Colombia
Congo
Cuba
Cyprus
Czechoslovakia
Denmark, not including Greenland
Dominican Rep.
Ecuador
Egypt
Ethiopia
Fiji
Finland
France, including French colonies
Gabon
Gambia, The
German Dem. Rep.
Germany, Fed. Rep.
Ghana
Greece
Grenada
Guinea
Guyana
Hungary
Iceland
India
Indonesia
Iran
Iraq
Ireland
Israel
Italy
Ivory Coast
Jamaica
Japan
Kenya
Kiribati
Korea, Dem. People's Rep.
Kuwait
Laos
Latvia
Lebanon
Lesotho
Liberia
Libya
Liechtenstein
Luxembourg
Madagascar

Malawi
Malaysia
Mali
Malta
Mauritania
Mauritius
Mexico
Mongolia
Morocco
Nauru
Nepal
Netherlands
New Zealand
Niger
Nigeria
Norway
Oman
Pakistan
Papua New Guinea
Paraguay
Philippines
Poland
Portugal
Romania
Rwanda
St. Lucia
Saudi Arabia
Senegal
Seychelles
Sierra Leone
Singapore
Solomon Is.
South Africa
Spain
Sri Lanka
Sudan
Suriname
Swaziland
Sweden
Switzerland
Syrian Arab Rep.
Tanzania
Tonga
Trinidad & Tobago
Tunisia
Turkey
Tuvalu
Uganda
Union of Soviet Socialist Reps.
United Kingdom
United States
Upper Volta
Uruguay
Venezuela
Viet-Nam, Rep.
Western Samoa
Yemen (Aden)
Yugoslavia
Zaire
Zambia
Zimbabwe

APPENDIX E

CONSTITUTION OF THE UNITED STATES

* * * *

ARTICLE II

SECTION 2. [1] The President * * *.

* * * *

[2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * *

ARTICLE III

* * * *

SECTION 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * *

ARTICLE VI

* * * *

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * *

APPENDIX F

Order 74-1-16

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 3rd day of January, 1974

Docket 26274

IN THE MATTER OF WARSAW CONVENTION LIABILITY LIMITATIONS AS EXPRESSED IN U.S. DOLLARS

ORDER

Section 221.38(j) of the Board's Regulations requires U.S. and foreign air carriers which avail themselves of the limits of liability to passengers provided in the Warsaw Convention (49 Stat. 3000; T.S. 876) to include in their tariffs, *inter alia*, a statement as to the amount of the liability limits of the Convention stated in dollars. These provisions of the tariffs, as well as those setting forth limitations of liability under the Convention with respect to baggage and property, restate the applicable law and serve to advise the public of the Convention limitations on their right of recovery for death, or injury or loss or damage to baggage and property.

The liability limits in the Warsaw Convention are set forth in terms of gold francs so that as long as the value of the dollar in terms of gold remained constant, no change was required in the dollar amount of the liability limits contained in the tariffs. However, by Order 72-6-7 adopted

June 2, 1972, the Board directed the carriers to revise their tariffs to reflect the devaluation of the dollar in terms of gold from $35 per ounce to approximately $38 which took place effective May 8, 1972, and such revisions have been made. On September 21, 1973, Public Law 93-110 was enacted further devaluating the U.S. dollar to approximately $42.22 per ounce of gold effective October 18, 1972. As a result, the minimum liability limits specified in Order 72-6-7 and the tariffs currently on file with the Board no longer meet the minimum liability limits of the Convention and a revision of the tariffs is necessary to accurately reflect such limits in dollars.[1]

In view of the foregoing and all other relevant matters, the Board finds and concludes:

1. That the dollar limitations stated in the presently effective tariffs of the respondent air carriers and foreign air carriers no longer meet the minimum liability requirements of the Warsaw Convention for "international transportation" or of the Hague Protocol[2] and "international carriage" as defined therein.

2. That, in this circumstance, such tariff limitations are inconsistent with the applicable law as set forth in the Convention or the Protocol, and the tariff filing requirements in Section 403 of the Federal Aviation Act of

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[1] With respect to their liability to passengers, this order will affect only a small proportion of the U.S. and foreign air carriers. Most carriers engaged in international transportation by air involving journeys to or from the United States adhere to the Montreal Agreement (Agreement CAB 18900 approved by Order E-23680 dated May 13, 1966, 31 FR 7302) pursuant to which they have filed tariffs providing for a $75,000 limit of liability for death or injury to passengers. Since this limit is stated in terms of U.S. dollars, it is unaffected by the change in the gold value of the dollar.

[2] The Hague Protocol of 1955 doubles the Warsaw liability limit for passengers, but since the United States has not signed or adhered to the Protocol, its provisions do not normally apply with respect to air transportation.

1958, and Part 221 of the Board's Regulations and they must be canceled.

3. That the minimum acceptable figures in United States dollars for liability limits applicable to "international transportation" and "international carriage" are as follows:

Convention and Protocol Minimum Liability	Actual	Rounded [3]
125,000 francs (per passenger, Convention only)	$10,002.90	$10,000.00
250,000 francs (per passenger, Hague Protocol only)	20,005.80	20,000.00
5,000 francs (per passenger for unchecked baggage)	400.116	400.00
250 francs (per kilogram for checked baggage and goods)	20.00580	20.00
250 francs (per kilogram on a per-pound basis)	9.07460	9.07

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, particularly Sections 204(a), 403, and 1002 thereof,

IT IS ORDERED THAT:

1. The carriers named in Appendix A, attached hereto, shall revise all liability limitations which may be applicable to "international transportation" or "international carriage" as defined in the Convention or the Protocol which are inconsistent with the dollar amounts set forth herein so as to conform with such amounts.

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[3] Article 22 of the Warsaw Convention permits the liability limits specified therein in gold francs to be converted into any national currency in round figures. The Board is permitting the round dollar amounts set forth in this order to be filed in the tariffs for purpose of convenience. This order is not intended to prohibit carriers from specifying the actual dollar equivalents in their tariffs as some of them do at the present time. The dollar values herein are calculated in accordance with the criteria detailed in Order 72-6-7.

2. The tariff cancellations directed in ordering paragraph 1 above shall become effective on or before February 6, 1974 on not less than 10 days' notice.

3. That copies of this order shall be served on the air carriers and foreign air carriers named in Appendix A.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

[SEAL]

APPENDIX G

Civil Aeronautics Board Order 78-8-10 (excerpts)

DOCKETS 25280, 27573, AGREEMENTS CAB 2698, R-41; 2699, R-49; 2700, R-43; 3119; 7648, R-107; 24475, R-4, R-5; 25186, R-12; 25954, R-1, R-2, R-3; 26701, R-9, IATA, CARGO CARRIAGE CONDITIONS—order 78-8-10 adopted August 3, 1978.

On June 21, 1974, the International Air Transport Association submitted, pursuant to section 412 of the Act, resolution 600b (agreement CAB 24475, R-4) restating the conditions of carriage of cargo to appear on the back of cargo airwaybills and resolution 600j (agreement CAB 24475, R-5) restating the condition to appear on the face of the airwaybills. Thereafter, the Board issued order 75-11-106 on November 26, 1975, inviting all interested persons to submit comments on these agreements and to show cause why the proceeding in agreement CAB 7648, order E-8543 (printed with order E-11024), *Pan Am. World Airways et al., Conditions of Carriage*, 24 C.A.B. 575, 580-591 (1957), should not be terminated and why the Board's earlier approval of agreements CAB 2698 et al., order E-3230, *IATA Traffic Conference Resolutions*, 10 C.A.B. 783 (1949), should not be withdrawn.

The last previous Board approval of IATA conditions of carriage for cargo occurred on September 1, 1949, *IATA Traffic Conference Resolutions, supra*. Though the Board approved the resolution then before it on the ground that the "establishment of these uniform conditions should minimize confusion and misunderstanding," the Board took pains to note that "serious questions relating to the public interest could arise," and placed its interpretation on several of the provisions. The Board concluded with the following admonition (*id.* at 793-794):

> We extend our approval for a temporary period in order to permit the immediate use of the uniform

> arrangements discussed herein pending revision of the provision under consideration in a manner consistent with the views expressed herein. Should the carriers fail to make such revision at their first opportunity, the public interest may require us to withdraw the approval herein granted.

In 1954 the IATA carriers filed a revision to the earlier approved resolution (agreement CAB 7648, R-107, adopted by the IATA traffic conferences in Honolulu in November 1953). In considering the Honolulu revisions in order E-8543,[1] the Board stated:

> The Board is seriously concerned with the little progress that appears to have been made to revise the basic provisions of these agreements to meet the points raised in the aforesaid opinion. While still recognizing the importance of uniformity in the tickets, waybills, and conditions of carriage, it is of the opinion that such uniformity should not be obtained at the sacrifice of the rights of passengers and shippers, and that further approval of provisions which are otherwise adverse to the public interest is not warranted.

The Board, accordingly, tentatively approved some of the provisions, some conditionally, and tentatively disapproved others, giving parties 30 days within which to file objections. Objections were filed by the IATA carriers, in which they requested the opportunity for conferences with the staff of the Board for purposes of facilitating disposition of the issues. The Board authorized such informal discussions by order E-8842, dated December 22, 1954, but no final resolution of the cargo issues ever materialized.[2] The result is that the tentative order of August 5, 1954, with respect to cargo, never became final,

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[1] *Pan Am. World Airways et al., Conditions of Carriage, supra* at 581.

[2] The informal conferences resulted in a revised resolution respecting passenger service which was approved by order E-11024.

and the only order of approval of IATA conditions on cargo now in effect is that of September 1, 1949 (*IATA Traffic Conference Resolutions, supra*).

Comments[3] in response to order 75-11-106 have been filed by IATA, Seaboard, the Board's Office of Consumer Advocate (OCA), and (jointly) the National Retail Merchants Association, the Shippers National Freight Claim Council, Inc., and the National Small Shipments Traffic Conference (Shippers). In addition, IATA submitted agreement CAB 25954, R-1, R-2, and R-3, docket 27573, revising or canceling some of the provisions in the 1974 agreements, which meet some of the objections listed in appendix C to order 75-11-106. Attached are appendixes A and B containing resolutions 600b and 600j, as filed and as amended. Neither IATA nor the carrier parties address the part of order 75-11-106 dealing with the rescission of the Board's approval of the earlier IATA agreement in *IATA Traffic Conference Resolutions, supra*, or the termination of the proceeding in *Pan Am. World Airways et al., Conditions of Carriage, supra*.

Order 75-11-106 also deferred decision on the provisions of the agreement that presented issues similar to those under review by the Board in the Liability and Claim Rules and Practices Investigation, docket 19923. By order 76-3-139, March 22, 1976, and order 77-3-61, *Liability and Claim Rules and Practices*, 73 C.A.B. 116 (1977), the Board resolved these issues, and we are now able to dispose of the matters before us. Petitions to review certain aspects of orders 76-3-139 and 77-3-61 were filed by American Airlines et al. in the U.S. Court of Appeals for the District of Columbia Circuit. Thereafter Congress passed and the President signed Public Law 95-163, removing Board jurisdiction over the reasonableness of domestic cargo rates and rules. When the

[3] App. C to order 75-11-106 contains an analysis and the Board's tentative findings as to each provision of the IATA agreements in issue so that comments could be directed to the specific problems enumerated.

enactment of Public Law 95-163 was called to the attention of the court, the court vacated and remanded the proceedings to the Board.

Inasmuch as the resolutions and agreements before us concern international traffic, we believe that neither the court's remand nor Public Law 95-163 prevents us from giving such weight as we think necessary to the findings and conclusions of the Liability Rules case.

We turn now to section-by-section consideration of the conditions of carriage.

RESOLUTION 600b

Article (1).—Article (1) is the preamble to the conditions of carriage and states that the Warsaw Convention,[4] if applicable, limits the liability of the carriers for loss or damage to the cargo. Though this preamble on the back of the waybill does not specifically refer to the carrier's liability for *delay*, the front of the waybill contains a statement that Warsaw limits the carrier's liability for loss, damage, or *delay* of cargo. Moreover, article 19 of Warsaw specifically provides that the carrier shall be liable for damages occasioned by delay in the transportation of cargo.[5] In these circumstances, we consider the omission of the word "delay" in the preamble to be an oversight, which the carriers shall correct.

Article (1)1.—This subparagraph defines carrier as all air carriers which carry or undertake to carry cargo under the airwaybill or perform any other services incidental to such air carriage. The Warsaw Convention is defined as the convention signed at Warsaw on Octo-

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[4] Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw Oct. 12, 1929 (49 Stat. 3000), referred to as "Warsaw Convention" or simply "Warsaw."

[5] Art. 23 of Warsaw further provides that any provision tending to relieve a carrier of its liability under Warsaw shall be null and void.

ber 12, 1929, or the Convention as amended at The Hague, September 28, 1955.[6] The definition of French gold francs is the same as the definition in the Warsaw Convention—consisting of 65½ milligrams of gold with a standard fineness of nine hundred-thousandths. These are standard definitions, and no objections have been filed against them. This subparagraph will be approved.

Article (1)2(a).—This subparagraph states that the Warsaw Convention is applicable unless the carriage is not "international transportation" as defined in the Warsaw Convention. The Board's decision in docket 19923 retained the distinction between Warsaw and non-Warsaw traffic,[7] so the Board will approve this provision.

Article (1)2(b).—This subparagraph states that the carriage of cargo is subject to applicable laws, regulations, and tariffs which are made a part of the contract of carriage. This provision is approved subject to the condition that it is not to be construed as Board approval, either express or implied, of the provisions of any of the filed tariffs.

Article (1)3.—This subparagraph provides for the abbreviation of a carrier's name on the waybill. It also provides that carriage to be performed by several successive carriers shall be regarded as a single operation. Inasmuch as most carriers' abbreviations are generally understood and no party objected to this provision, we shall approve this subparagraph.

Article (1)4.—This subparagraph states that except as otherwise provided in a carrier's tariffs or conditions of carriage, the carrier's liability for non-Warsaw cargo

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[6] Referred to as the "Hague Protocol" in this order.

[7] Under Warsaw, international transportation not only must take place between two countries, but the two countries must also be signatories to the Convention. There are several countries which have not adopted the Convention, giving rise to the distinction between so-called Warsaw and non-Warsaw traffic.

shall not exceed $20 per kilogram of the goods lost, damaged, or delayed, unless a higher value is declared and additional charges paid. At the present time a carrier's liability for Warsaw traffic, in the absence of a declaration of higher value, is $20 per kilogram, so that this subparagraph provides the same monetary limit for non-Warsaw traffic, unless the carrier's tariff provides otherwise. • • •

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APPENDIX A

Resolution 600b Air Waybill—Conditions of Contract (1974 agreement CAB 24475, R-4) (as amended by 1976 agreement CAB 25954-R1, and 1977 agreement CAB 26701-R9) (new)

106(CTPC)600b, 206(CTPC)600b, 306(CTPC)600b
Expiry, indefinite; type, B

RESOLVED THAT:

(1) The conditions of contract, prefaced by a notice, on the reverse side of the air waybill/consignment note, read as follows:

NOTICE CONCERNING CARRIERS LIMITATION OF LIABILITY

If the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the convention governs and in most cases limits the liability of the carrier in respect of loss of or damage to cargo to 250 French gold francs per kilogramme, unless a higher value is declared in advance by the shipper and a supplementary charge paid if required. The liability limit of 250 French gold francs per kilogramme is approximately U.S. $20 per kilogramme on the basis of U.S. $42.22 per ounce of gold.

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APPENDIX H

FOR INFORMATION

CIVIL AERONAUTICS BOARD

May 20, 1981

MEMORANDUM

TO: The Board

FROM: Director, Bureau of Compliance and Consumer Protection

CC: Director, Bureau of International Aviation
Director, Bureau of Domestic Aviation
General Counsel

SUBJECT: Warsaw Convention Liability Limits

For more than a year now, various components of the Board's staff have been considering the question of how the liability limitations contained in the Warsaw Convention should be converted to dollars. The question is a troublesome one, and the memoranda exchanged among the staff have not reached the same conclusions of this issue.[1] There is considerable interest in the final resolution of this matter among parties outside the Board, including some involved in litigation where the amount of potential liability is a significant issue.

The Board has never taken a position as to which liability limitation level is correct, and the Bureau of Compliance and Consumer Protection recommends that the Board decline to take any position which would affect the determination of liability limits until the matter has been further defined at the staff level. Any policy recommendation that would come from the staff should be communicated to the Departments of Transportation and State as

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[1] This Bureau wrote the first memorandum in March, 1980. BIA and BDA wrote reply memos in April, 1980.

well in the hope of reaching interagency agreement. This memorandum contains BCCP's reappraisal of the problem and is intended to initiate a fresh start in addressing the question at the Board.

I. *Background*

The Warsaw Convention was signed at Warsaw, Poland, on October 12, 1929, and ratified by the United States Senate on July 31, 1934.[1a] Among its most compelling purposes were the protection of the fledgling aviation industry from potentially ruinous damage judgments and the assurance of some reliable and consistent basis for recovery for injury or damage to persons or property.[2] Thus the Convention (a) enunciated carriers' liability for personal injuries (Article 17), damage or loss of baggage and other property (Article 18), and damage due to delay (Article 19) subject to affirmative defenses which could be proved by a carrier, *i.e.*, the carrier's freedom from fault (Article 20) or the injured person's contributory fault (Article 21); (b) provided a limitation on the extent of liability (Article 22); and (c) nullified any provision tending to relieve a carrier of any such liability or to fix a lower limit (Article 23). In addition, the Convention required carriers to provide notice to the passengers in the form of a ticket or baggage check with respect to, *inter alia*, the limitations on liability, and barred defenses permitted by the Convention, including the limitation of liability, if carriers accept passengers or baggage without delivering the required ticket or baggage check (Articles 3 and 4).

The Board has implemented Articles 3 and 4 by specifying the notice carriers must provide concerning the lia-

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[1a] 49 Stat. 3000.

[2] Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 498-500 (1967). See also Horner & Legrez, Minutes, Second International Conference on Private Aeronautical Law, Warsaw 1929 (Fred B. Rothman & Co. 1975), pp. 38, 40-41.

bility limits. 14 C.F.R. Sections 221.175 and 221.176. Carriers also include the liability limits in tariffs filed with the Board, as required by Section 403(a) of the Act and Part 221.3 of the Board's Regulations. The Board has also been an active participant in Congressional hearings concerning possible amendments to the Convention.

In March, 1980, our former Policy Development Division sent the Board a memo suggesting that carriers are violating the Warsaw Convention by asserting liability limits much lower than those actually permitted by the Convention. These limitations are expressed in terms of gold and have always been converted to dollars by use of the official rate of gold. Since there no longer is an "official" price for gold in the U.S., the memorandum suggested that the market value of gold has to be used in converting the liability limits to dollars.

BIA and BDA have written memos responding to this suggestion. Each response posed two major objections, *i.e.*, (1) that the recommendation is inconsistent with the intention of the Warsaw signatories and (2) that it is inconsistent with IMF amendments establishing "Special Drawing Rights" tied to a basket of 16 currencies, rather than gold, as the basic unit of account for converting currencies. The Board has not taken any action on the recommendation.

II. *Discussion*

In 1929, when the Warsaw Convention was adopted, currencies were either expressed in gold or easily convertible to gold using an official rate. From 1933 to 1974, gold ownership in the United States was legal only for a small class of uses, such as jewelry-making and dentistry. The price of gold in these transactions was dictated by the government's official price, since it was the government's policy to buy and sell gold at that rate. A private buyer would thus not pay more than the official rate because he could buy it from the government at that price and,

conversely, a private seller would not accept less than the official rate because he could sell it to the government for that amount.

The drafters of the Warsaw Convention thus foresaw no ambiguity in their use of gold as the unit of account because at the time governments had an official rate of gold which was easily discernible and virtually identical to the market rate of gold, to the extent that a market rate existed at all. Seeing no ambiguity, they never addressed the question of whether the official or market rate should be used in converting the limits to national currencies. To determine how the limits should be converted now that there is no official rate, one must attempt to determine what is most consistent with the purpose of the limitation on liability.

The primary purpose of the liability limits in the Warsaw Convention is the protection of carriers from unforeseeable and unlimited liability. At the time of the Convention, it was feared that carriers would refuse to carry passengers and or cargo unless they could measure the scope of risk they were assuming. The limits were thus intended to provide a measure of predictability for carriers so that they could operate free from the fear of unlimited liability.

The use of gold as the unit of account was intended "to avoid, as far as the limits are concerned, the effects of devaluations which would result from having the limits expressed in any local currency." [3] The use of gold was

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[3] H. Drion, *Limitations of Liabilities in International Air Law* 1954. p. 183. Other writers agree but add that the use of gold was also intended to assure that damages awarded by different countries would have a uniform value and to provide stability in terms of the purchasing power represented by the limits. Bristow, "Gold Franc—Replacement of Unit of Account," LMCLQ 31 (1978), Asser, "Golden Limitations of Liability in International Transport Conventions and the Currency Crisis," 5. J. Maritime L. and Com. 645 (1973-74), Norway, "Conversion from Poincare Franc to National

thus seen as providing more stability than any national currency could, further promoting the predictability the limits were intended to provide. This was because national currencies were subject to devaluation by their country, whereas the value of gold was not subject to change as the result of a single country's unilateral action.

There can be no doubt that use of the official rate of gold produces results more consistent with these purposes than use of the market rate. The official rate of gold, at least in the United States, fluctuated only rarely. Even in countries whose currencies were devalued more frequently, the official rate would provide greater predictability and stability than the market rate. This is especially true now, since speculation has led to wildly fluctuating market prices of gold.

Use of an official rate is supported by the approach adopted in more recent Conventions, when the ambiguity of expressing limits in terms of gold was more apparent. Both the Convention Concerning Liability for Oil Pollution, signed in Brussels in 1969, and the Convention Relating to the Limitation of the Liability of the Owners of Inland Navigation Vessels, signed in Geneva in 1973, expressly provided for the use of the official value of gold in setting liability limits.[4] Conversion by the official rate is further bolstered by the fact that a majority of courts have used it in converting Warsaw's limits after the official and market rates began to diverge.[5] ICAO also passed a resolution in 1974 opposing the use of the market price of gold in converting Warsaw's limits, which pro-

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Currency," Presented to the 1974 meeting of ICAO's Legal Committee, and Tobolewski, "The Special Drawing Right in Liability Conventions: an Acceptable Solution?" 2 LMCLQ 169, 171 (1979).

[4] The Legal Committee of ICAO, *Resolution Concerning the Conversion of Poincare Francs to National Currencies in the Warsaw and Rome Conventions*, 1974.

[5] Tobolewski, "The Special Drawing Right in Liability Conventions: An Acceptable Solution?" 2 LMCLQ 169, 171 (1979).

vides a strong indication of how other participating countries feel.[6]

Since it appears that stable limits were of paramount importance to the drafters of the Convention, basing them on the market value of gold would be inconsistent with the Convention. Since there is no longer an official rate of gold in the United States, however, it is not entirely clear how the limits should be converted.

In 1975, the Warsaw signatories attempted to deal with the changes in the role of gold in international monetary transactions. Their answer, embodied in the Montreal Protocol, was the substitution of Special Drawing Rights (SDR's) for gold as the basis for conversion. The SDR is a creation of the International Monetary Fund (IMF), the agency which establishes the basic ground rules for currency transactions between member countries. Use of SDR's by the Montreal signatories was presumably intended to eliminate the confusion over how the Warsaw limits should be converted from gold to national currencies. With no official rate of gold and a fluctuating market rate which would produce results at odds with the Convention's purposes, the Montreal signatories chose to abandon gold in favor of SDR's because SDR's provided the stability and ease of conversion which had attracted the Warsaw signatories to choose gold as the unit of account.

The United States supported the SDR approach at Montreal and signed the Montreal Protocol.[7] If the Senate had ratified the Protocol, the SDR approach would be law and there would be no problem in determining Warsaw's limits. The Senate has not ratified the Protocol, however, although it was submitted for ratification in January, 1977. Its failure to either ratify or reject the Protocol

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[6] See footnote 4.

[7] Fitzgerald, "The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing Internation Carriage by Air," 42 J. Air L. & Comm. 273, 325, 329-30 (1976).

makes determination of the proper conversion rate difficult because (1) as explained above, use of the market rate of gold produces results inconsistent with the Convention's purposes, (2) there is no current official rate of gold and (3) the United States is obligated by international law to refrain from acts which would defeat the object and purpose of the Montreal Protocol.[8]

To fulfill its obligation to observe, to the extent possible, the requirements of both the Warsaw Convention and Montreal Protocol, the Board has for the past five years been engaging in a legal fiction. Unable to use the SDR approach because Montreal has not been ratified and constrained from using the market price of gold because doing so would defeat the object and purpose of both Montreal and Warsaw, the Board has continued to convert Warsaw's limits based on the official rate of gold immediately preceding the elimination of all ties between gold and the dollar.[9] This approach produces the greatest degree of stability possible since the dollar limits will remain constant unless and until the United States reestablishes ties between gold and the dollar.

We believe that the Board's current course of action is superior to any of the alternatives currently available. Use of the last official rate of gold, however may at times prevent passengers from recovering the full extent of damages caused by carriers.[10] Carriers may no longer need

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[8] Article 18, Vienna Convention on the Law of Treaties, requires a country to refrain from acts which would defeat the purpose and object of a treaty it has signed until it makes clear its intention not to become a party. This obligation applies even when the treaty was signed subject to ratification and has not yet been ratified.

[9] Thus, the notice of Warsaw's limits required by Parts 221.175 and 221.176 of the Board's Regulations is based on conversion at this rate.

[10] The limits are $9.07 per pound for checked luggage, $400 for carry-on-bags and approximately $10,000 per passenger. The $10,000 limit is superseded, however, by a $75,000 limit adopted by carriers in 1966.

the protection of these low limits, given the maturation of the aviation industry since 1929.

Because of the confusion inherent in converting Warsaw's limits when there is no official rate of gold and the equitable considerations raised by the low limits currently in force, we believe the Board should develop a coherent policy resolution of the questions, and then meet with the Departments of Transportation and State to review this problem. These agencies will be solely responsible for enforcing Warsaw in the future and have participated actively in formulating U.S. policy in this area in the past. Pending resolution of this issue by the three agencies we believe the Board should take no action which would disturb the conversion formula now contained in sections 221.175 and 221.176 of the regulations.

/s/ John Golden
JOHN GOLDEN

Prepared by:

Steven Rothenberg
Ext. 3-5943

APPENDIX I

Membership List of International Air Transport Association (IATA)

(As of January 15, 1983)

Members who join IATA as potential intervenors herein are designated by an asterisk.

ACTIVE Members

*Aer Lingus Teoranta
*Aerolineas Argentinas
*Aeronaves de Mexico S.A. (AEROMEXICO)
Aerovias Nacionales de Colombia S.A. (AVIANCA)
Air Afrique
Air Algérie
Air Botswana Pty. Ltd.
Air Burundi
*Air Canada
*Air France
Air Gabon
Air Guinée
*Air-India
*Air Malawi Limited
Air Mali
Air Malta
*Air Mauritius
*Air New Zealand
Air Niugini
Air Pacific
Air Tanzania Corporation
Air Tungaru Corporation
Air UK
Air Vanuatu Limited
Air Zaire
Air Zimbabwe
*ALIA—The Royal Jordanian Airline (a wholly owned subsidiary of Arab Wings)

*ALITALIA—Linee Acree Italiano
American Airlines Inc.
Ariana Afghan Airlines Co. Ltd.
Austrian Airlines

Braniff International Inc.
*British Airways
*British Caledonian Airways Ltd.

Cameroon Airlines
Caribbean Air Cargo Company Ltd.
*Ceskoslovenske Aerolinie (CSA)
Compania Mexicana de Aviacion S.A. de C.V.
*CP Air
*Cruzeiro do Sul S.A.—Servicos Aéreos
Cyprus Airways Limited

*Deutsche Lufthansa A.C.

*Eastern Air Lines Inc.
*Egyptair
*El Al Israel Airlines Limited
Empresa Consolidada Cubana de Aviación
(CUBANA)
*Empreso Ecuatoriana de Aviacion
(ECUATORIANA)
*Ethiopian Airlines

Finnair OY
Flying Tiger Inc. (a wholly owned subsidiary of Tiger International)

P.T. Garuda Indonesian Airways
Ghana Airways Corporation
Gulf Air Company G.S.C.

*IBERIA, Líncas Aéreas de España S.A.
Icelandair
Indian Airlines
*Iran Air, The Airline of the Islamic Republic of Iran
*Iraqi Airways

Jamahiriya Libyan Arab Airlines
*Japan Air Lines Co. Limited
Jugoslovenski Aerotransport (JAT)

Kenya Airways Ltd.
*KLM Royal Dutch Airlines
*Kuwait Airways Corporation

LAM—Linhas Aéreas de Mocambique
Línea Aérea del Cobre Ltda. (LADECO)
Línea Aérea Nacional de Chile (LAN-CHILE)
Línea Aéreas Constarricenses S.A. (LACSA)
Lloyd Aéreo Boliviano S.A. (LAB)

*Middle East Airlines Airliban

Nigeria Airways Limited

*Olympic Airways S.A.

Pakistan International Airlines Corp.
*Pan American World Airways, Inc.
*Philippine Airlines Inc.
Polskie Linie Lotnicze (LOT)
*Polynesian Airlines (Operations) Ltd.
Primeras Lineas Uruguayas de Navegacion Aérea (PLUNA)

*Qantas Airways Limited

Royal Air Maroc
Royal Swazi National Airways Corporation Ltd.

*SABENA (Société anonyme belge d'exploitation de la navigation aérienne)
*Saudi Arabian Airlines Corp.
*Scandinavian Airlines System (SAS)
Sierra Leone Airlines Limited
Solomon Islands Airways Limited (SOLAIR)
Somali Airlines
*South African Airways
Sudan Airways

*Swiss Air Transport Co. Limited (SWISSAIR)
Syrian Arab Airlines

TAAG—Linhas Aereas de Angola (Angola Airlines)
*TAP—Air Portugal
Trans-Mediterranean Airways S.A.R.L. (TMA)
Trans World Airlines Inc. (a wholly owned subsidiary of Trans World Corp.)
Trinidad and Tobago (BWIA International) Airways Corp.
Tunis Air
Turk Hava Yollari A.O. (Turkish Airlines)

*Union de Transports Aériens (UTA)
United Airlines

*VARIG S.A. (Viacao Aérea Rio-Crandense)
Venezolana Internacional de Aviacion S.A. (VIASA)

YEMENIA Yemen Airways Corporation

Zambia Airways Corporation Ltd.

ASSOCIATE Members

Aerolineas Cordillera Ltda. (AEROCOR)
Air Liberia
Ansett Airlines of Australia (a division of Ansett Transport Industries Ltd.)
Aviacion y Comercio, S.A. (AVIACO)

Commercial Airways (Pty.) Ltd.

Douglas Airways Pty. Limited

*Eastern Provincial Airways Limited
East-West Airlines Limited

IPEC Aviation

Kendall Airlines (a division of Ansett Transport Industries Ltd.)

Masling Commuter Services Pty. Ltd.
Mount Cook Airlines (a division of the Mount Cook Group Ltd.)

Namib Air (Pty.) Ltd.

Quebecair

TALAIR Pty. Limited
Trans Australia Airlines
Transbrasil S.A. Linhas Aéreas (Trans Brasil)
Trans-Jamaican Airlines Limited

Viacao Aérea Sao Paulo S.A. (VASP)